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ORIGINAL

No. 88-7247

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

BRYAN STUART LANKFORD,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

Supreme Court, U.S.
FILED
MAY 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 46.1 of the Rules of this Court, motion is hereby made that Petitioner be allowed to proceed in forma pauperis. Petitioner's affidavit is attached to this motion. Leave to proceed in forma pauperis was sought and obtained in all courts below.

Dated this 18th day of May, 1989.

JOAN MARIE FISHER
Attorney for Petitioner

Joan Marie Fisher
JOAN MARIE FISHER

15P

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF IDAHO)
) ss
County of Ada)

I, BRYAN STUART LANKFORD, being first duly sworn, depose and say that I am the Petitioner, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fee, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No.

The date of my last employment was May, 1983.

The amount of salary and wages I received per month was less than $ 1,000.00.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? I.D.O.C., $50.00.

3. Do you own any cash or checking or savings account? No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

BRYAN STUART LANKFORD

SUBSCRIBED AND SWORN to before me this 25th day of April, 1989.

Notary Public in and for the State of Idaho, residing at Genesee, Idaho

file
correct copy

No. 88-7247

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ATTORNEYS FOR PETITIONER

*Counsel of Record

QUESTIONS PRESENTED

1. Whether the Idaho death penalty statute violates the Sixth Amendment because it deprives a defendant of the right to a jury trial on the factual elements of capital murder?

2. Whether a death sentence violates the Sixth, Eighth and Fourteenth Amendments when it is imposed by a trial judge after the prosecutor has notified the defendant in writing, pursuant to court order, that the state would not seek the death penalty, and defense counsel, relying on the written notice, has made no argument and presented no evidence relating to the statutory aggravating factors or the appropriateness of imposing the death penalty?

3. Whether a sentence of death violates the Sixth, Eighth, and Fourteenth Amendments where it is based in part on unsworn, unreliable extrajudicial statements considered without any confrontation or cross-examination?

4. Whether Idaho's death penalty statute violates the Eighth and Fourteenth Amendments by requiring a death sentence to be imposed unless the defendant establishes the existence of mitigating factors sufficient to "make unjust the imposition of the death penalty"?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

BRYAN STUART LANKFORD,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

Petitioner Bryan Stuart Lankford respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Idaho affirming his sentence of death.

OPINIONS BELOW

The original opinion of the Idaho Supreme Court affirming Petitioner's death sentence was reported at 113 Idaho 688, 747 P.2d 710 (1987) and is attached as Appendix A. This Court granted a Petition for Writ of Certiorari in Lankford v. Idaho, 486 U.S.--, 108 S.Ct. 2815 (1988) and vacated the judgment and remanded to the Idaho Supreme Court for reconsideration in light of Satterwhite v. Texas, 486 U.S. --, 108 S.Ct. 1792 (1988).

The Idaho Supreme Court's opinion on remand, reaffirming its prior decision, has not as yet been printed in the official reports, and is attached as Appendix B.

JURISDICTION

The opinion of the Idaho Supreme Court on remand from this Court was issued on April 4, 1989. Appendix B. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3), Petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the Constitution of the United States.

U.S. Const., Amend. VI (excerpt):

> "In all criminal prosecutions, the accused shall enjoy the right to a...trial, by an impartial jury... and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him;...and to have the assistance of counsel for his defense."

U.S. Const., Amend. VIII:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Const., Amend XIV (excerpt):

> "No State shall...deprive any person of life...without due process of law..."

This case further involves Idaho's statutory homicide and capital punishment scheme. These include Idaho Code §§ 18-4001, 18-4002, 18-4003(d), 19-2515, and 19-2516. These provisions are lengthy and are therefore included in Appendix C.

STATEMENT OF THE CASE

Petitioner Bryan Stuart Lankford was charged with two counts of murder during the perpetration of a felony, which is defined as murder in the first degree under Idaho Code § 18-4003(d). Upon a plea of not guilty, Petitioner was tried by jury before the Hon. George Reinhardt, III, of the Second Judicial District Court, in Idaho County, Idaho.

The primary evidence of the killings came from Petitioner's statements to police and his testimony at trial. Petitioner confessed and testified he participated in robbing the homicide victims, Robert and Cheryl Bravence, who were camping in rural Idaho. During the robbery, Petitioner's older brother (and later co-defendant) Mark Lankford hit each victim across the back of the head or neck, two to three times with a nightstick. Petitioner, who believed the robbery victims to be unconscious, helped move them from the original campsite. At a more remote area, Mark Lankford removed the couple from a van and carried them into the woods. Petitioner testified he did not know or believe that the Bravences were dead at the scene of the robbery, and that he did not intend to kill, plan to kill or engage in any conduct that was intended to result in serious bodily injury or death to the couple. Circumstantial evidence generally confirmed the sequence of events as described by Petitioner in his statements and trial testimony.

The jury was instructed that the required element of "malice" is implied when "the killing is a direct and casual [sic] result of perpetration or attempt to perpetrate a felony inherently dangerous to human life, specifically in this case robbery." R. Vol. II, p. 264. The jury was also instructed under the Idaho law of principals, specifically that "it is therefore not necessary that the State prove that this defendant actually committed the act which caused the death of the victims, provided the State prove beyond a reasonable doubt the defendant was present, and that he aided and abetted in the commission of the crime of robbery as alleged." (R. Vol. II, p. 270.) The jury was further

instructed that the State need not prove that the killing was intentional, but only that a human being was killed by any one of several persons engaged in the perpetration of the crime of robbery. R. Vol. II, p. 272. A requested jury instruction on Petitioner's specific intent was refused, and that issue was withheld from the jury. R. Vol. II, p. 242. Based upon those instructions, the jury returned a verdict of guilty of first degree felony murder on both counts. R. Vol. II, pp. 244, 250.

Following the jury verdicts, but before sentencing, Petitioner was called as a witness for the prosecution at the trial of Mark Lankford, which was conducted separately before Judge Reinhardt. Upon advice of counsel, Petitioner refused to testify, claiming his Fifth Amendment right not to incriminate himself. Consequently, the State entered into an immunity agreement with Petitioner, which was approved by Judge Reinhardt.

Under this immunity agreement, Petitioner testified for the State of Idaho against the Mark Lankford. Petitioner's testimony was the only direct testimony of the manner in which the killings were committed, and supported the State's theory that Mark Lankford instigated the robbery, assaulted the victims during the robbery and committed the killings. Petitioner's testimony also provided details of Mark Lankford's activities following the robbery up to and including his arrest, which were not otherwise available to the prosecution. In all, Petitioner's testimony at Mark Lankford's trial comprised over 200 pages of transcript. Mark Lankford was convicted of two counts of first degree murder.

After the verdict in Mark Lankford's trial, but prior to Petitioner's sentencing, the trial court entered an order requiring the State to notify the Court and Petitioner's counsel in writing whether the State would be seeking and recommending the death penalty, and to specify any statutory aggravating factors upon which the State would rely to support the death

penalty.[1] The State filed a written response, replying:

> In relation to the above-named Defendant, Bryan Stuart Lankford, the State through the prosecuting attorney, will not be recommending the death penalty as to either count of First Degree Murder...

Appendix D (emphasis in original). No statutory aggravating factors were stated. Ibid.

After this notice was filed, Judge Reinhardt appointed new counsel to serve as co-counsel for Petitioner at sentencing. (Tr. M.N.T., pp. 6-11). A Motion to Dismiss Trial Counsel filed by Petitioner's newly-appointed counsel on the basis of ineffective assistance was granted. (Tr. M.N.T. p. 16.) Sentencing counsel had not heard the testimony at trial nor was a transcript of the trial available. (R. Trial, Vol. II, pp. 381, 389.) A Motion for Continuance of the sentencing hearing was filed on the grounds of new counsel's unfamiliarity with the prior proceedings and the request for a transcript of those proceedings. (R. Trial, Vol. II, pp. 356, 381, 388, 389). The Motion was denied. (Tr. M.N.T. p. 215).

Shortly thereafter, Petitioner was called as a witness at a hearing on a Motion for New Trial filed by Mark Lankford. Upon advice of counsel, Petitioner refused to testify. Judge Reinhardt reaffirmed the previous immunity agreement, ordered Petitioner to testify and specifically advised Petitioner and his counsel that the testimony would be used solely for purposes of the Mark

---

[1] The order stated in part:

> (5) That on or before June 18, 1984, the State shall notify the Court and the Defendant in writing as to whether or not the State will be seeking and recommending that the death penalty be imposed herein. Such notification shall be filed in the same manner as if it were a formal pleading;
>
> (6) That in the event the State shall seek and recommend to the Court that the death penalty be imposed herein the following shall be filed with the Court on or before June 18, 1984:
>
> (a) The State shall formally file with the Court and serve upon counsel for the Defendant a statement listing the aggravating circumstances enumerated in Idaho Code Section 19-2515(f) that it intends to rely upon and prove at the sentencing hearing to justify the imposition of the death penalty;
>
> (b) The Defendant shall specify in a concise manner all mitigating factors which he intends to rely upon at the time of the sentencing hearing.

Appendix D, p. 2.

Lankford's Motion for New Trial and for no other purpose. Tr M.N.T. #20158, p. 14, lines 3-8. Petitioner then testified that pending sentencing, he had become depressed and was persuaded by his brother Mark Lankford to call a local newspaper and admit to having committed the killings himself when Mark Lankford was not present. In his testimony, Petitioner denied the truth of the story told to the newspaper and reiterated the version of events to which he had previously testified. This testimony undermined Mark Lankford's Motion for New Trial, and that motion was denied.

On October 12, 1984, a sentencing hearing was held. At the hearing, the prosecuting attorney did not present any evidence of aggravating circumstances. Consistent with its written notice, the State did not seek or recommend the death penalty but rather urged the minimal sentence available -- indeterminate life. (Tr. M.N.T. p. 317.) Petitioner's counsel argued only factors which might influence the trial court's decision between a determinate life sentence (without possibility of parole) and an indeterminate life sentence. (Tr. M.N.T. p. 318-330.)

Judge Reinhardt disregarded the State's position, and despite lack of notice to Petitioner, sentenced Petitioner to death. Appendix E. The court's sentencing order found five statutory aggravating circumstances under Idaho Code 19-2515(f)--all based, in whole or in part, on the facts of the offense adduced at trial.

> (a) At the time the murder was committed, the Defendant also committed another murder...;
>
> (b) the murders were especially heinous, atrocious or cruel, and manifested exceptional depravity...;
>
> (c) by the murder, or circumstances surrounding its commission, the Defendant exhibited an utter disregard for human life...'
>
> (d) ...the murders were defined as murder of the first degree by Idaho Code § 18-4003(d) and the murders were accompanied with the specific intent to cause the deaths...;
>
> (e) the defendant, by prior conduct and by conduct in the commission of the murders at hand has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

Appendix E, at 3-4.

The evidence which the trial court cited in support of its findings of the aggravating factors was based on the trial testimony Petitioner's counsel had not heard or seen, the

immunized testimonies by the Petitioner in Mark Lankford's case, and hearsay information contained within the court-ordered presentence investigation (PSI). Information in the PSI was not limited to admissible evidence, but derived from unsworn, uncross-examined statements including: Houston, Texas, police offense reports of a 1980 robbery which was Petitioner's only prior felony conviction; statements by an inmate of Idaho County jail regarding an argument he had with Petitioner; and an unsworn statement by Mark Lankford accusing Petitioner of the Bravence robbery and killing, prepared for Mark Lankford's separate presentence investigation and sentencing.

In its "Reasons Why the Death Penalty Was Imposed", the trial court explicitly relied on this hearsay information, in part as follows:

> Bryan Lankford has floated from job to job and has in the past associated with undesirable individuals. He has no significant ties to any community or any individuals and his pattern of living clearly indicates that he will continue a life of criminal activity. Bryan Lankford was adjudged guilty of Robbery in 1980 and was placed on probation for 10 years. Finally, after being convicted of two counts of 1st degree murder, and while awaiting sentencing, the Defendant became involved in an altercation with, and threatened the life of, a fellow inmate in the Idaho County Jail.

Appendix E-7.

> Had Bryan Lankford been placed in prison for Robbery of the Safeway store the Bravences would be alive today. We cannot however fault the Texas judicial system for giving Bryan Lankford a chance to better himself and for giving him an opportunity to prove that he could be a productive citizen. At the time he was placed on probation he had a minor criminal record. He blamed all his troubles on his father's cruel treatment towards him and the bad influence that his brother had on him. Furthermore, his family supported him. Perhaps the reason that our judicial system is credible and viable is because a first time offender who threatens the life of an innocent Safeway clerk can be placed on probation and given a chance.

Ibid. The trial court's sentencing order also specifically relied on Petitioner's testimony in Mark Lankford's case, which was given under immunity. Id. at E-8.

After sentencing, pursuant to Idaho's consolidated capital

appellate procedure,[2] Petitioner filed a Petition for Post Conviction Relief. In that Petition he argued, among other things, that the sentence had been imposed in violation of the United States Constitution as a result of the "trial court's imposition of the death penalty despite the State's written notice that the State would not seek the death penalty." The Petition for Post Conviction Relief was denied.

On appeal, the Idaho Supreme Court affirmed Petitioner's conviction and sentence. State v. Lankford, 113 Idaho 688, 695, 747 P.2d 710 (1987); Appendix A. Justice Huntley of the Idaho Supreme Court concurred specially, adhering to his opinion that the United States and Idaho Constitution guarantee a right to jury trial in the sentencing of capital cases. Id. at A-9. Justice Bistline concurred only in affirming the verdict and dissented on these and other grounds. Id. at A-9.

Following the Idaho Supreme Court's affirmance, Petitioner's Petition for Writ of Certiorari was granted by this Court and the judgment was vacated and the case remanded for further consideration in light of Satterwhite v. Texas, 486 U.S.--- (1988). Lankford v. State, 486 U.S.--, 108 S.Ct. 2815 (1988). After the remand, the Idaho Supreme Court entered an "Order on Mandate of the United States Supreme Court" which vacated the Remittitur and reasserted jurisdiction of the appeal.

In its opinion on remand, in a three/two decision, the Idaho Supreme Court again affirmed Petitioner's sentence. Appendix B.

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[2] Idaho law provides for an expedited appellate procedure for capital cases. The post-conviction action must be brought before direct appeal, within 90 days of the imposition of sentence, and is the only state post-conviction action available, absent a showing of good cause. I.C. Section 19-2719.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. In the original appeal, Petitioner argued that the lack of jury participation in the resolution of the factual issues prerequisite to sentencing violated the Sixth, Eighth and Fourteenth Amendments of the United States Constitution. Defendant's Amended Brief, pp. 137-139. The Idaho Supreme Court summarily rejected the argument. Appendix A-5. On remand, the Idaho Supreme Court granted Petitioner permission to file a Third Supplemental Brief on this issue, in light of a Ninth Circuit decision in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc). Appendix F. Accordingly, Petitioner again argued the jury issue with particular focus on the Adamson opinion. Defendant's Third Supplemental Brief, pp. 2-17. However, in its opinion on remand, the Idaho Supreme Court refused to address the issue, noting it had been previously decided. Appendix B-8.

2. Immediately following the imposition of the death penalty, Petitioner's counsel filed a Petition for Post Conviction Relief wherein she argued that the imposition of the death penalty by the trial court, despite the State's written notice that it would not seek or recommend the death penalty, violated the Defendant's right to Due Process under the Fourteenth Amendment to the United States Constitution. The issue was also raised on appeal. Defendant's Amended Brief, pp. 127-135. The Idaho Supreme Court rejected the argument on its merits. Appendix A at A-5.

3. At trial, Petitioner requested a formal sentencing hearing. On appeal, he specifically argued that the consideration of hearsay in the form of unsworn, uncross-examined testimony at sentencing in a capital case is unconstitutional under the Eighth and Fourteenth Amendments of the United States Constitution and that it violated Defendant's right to confrontation and cross-examination recognized, among other places, in Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), cert. denied 464 U.S. 1003 (1983). Defendant's Amended Brief, pp. 141-144. The

argument was rejected on its merits. Appendix A-5.

4. While Petitioner's first Petition for writ of Certiorari was pending, the Eleventh Circuit Court of Appeals rendered its decision in Jackson v. Dugger, 837 F.2d 1469 (11th Cir.) cert. denied, 108 S.Ct 2005 (1988), holding that a jury instruction that death was presumed to be the appropriate penalty skewed the jury's discretion in favor of death, contrary to the Eighth Amendment. On remand from this Court, and the reassertion of jurisdiction of the appeal in this case by the Idaho Supreme Court, Petitioner raised and argued the unconstitutionality of the Idaho death penalty statute as creating an impermissible presumption of death and unconstitutionally shifting the burden of proof at sentencing from the state to the defendant. Supplemental Brief of Appellant, pp. 36-39. Petitioner reiterated this argument in his Third Supplemental Brief of Appellant filed in light of Adamson v. Ricketts, by leave of the Idaho Supreme Court granted after Adamson. Appendix F; Third Supplemental Brief of Appellant, pp. 17-25. However, the Idaho Supreme Court's opinion on remand did not explicitly address the issue. Appendix B.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE IDAHO SUPREME COURT AND THE NINTH CIRCUIT COURT OF APPEALS REGARDING THE ISSUE OF WHETHER THE SIXTH AMENDMENT GUARANTEES A DEFENDANT THE RIGHT TO A JURY DETERMINATION OF THE STATUTORY AGGRAVATING FACTORS AS ELEMENTS OF THE OFFENSE OF "CAPITAL MURDER."

In its recent decision in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc), the Ninth Circuit effectively rendered unconstitutional the Idaho death penalty statute. Adamson held that Arizona's death penalty statute, in which the trial judge is the sole authority to make factual determinations regarding the existence of aggravating circumstances, was unconstitutional under the Sixth and Fourteenth Amendments. 865 F.2d at 1023-29. The Adamson court reasoned that the statute erroneously labeled elements of the offense as sentencing factors and deprived the Defendant of a right to a jury trial on the elements of capital

murder. Adamson v. Ricketts, 865 F.2d at 1026.

A narrow majority of the Idaho Supreme Court has rejected the holding in Adamson and held that it was not unconstitutional "for a judge, instead of a jury, to determine whether any of the aggravating circumstances listed in the statute exist." State v. Charboneau, Nos. 16339/16741 Supreme Court of Idaho, 1989 Ida. Lexis No. 53, April 4, 1989, as amended April 18, 1989 at p. 29. Two Justices of the Idaho Supreme Court dissented from this holding, finding the reason and rule of Adamson to be persuasive, and noting that "[t]he Idaho sentencing procedure under I.C. § 19-2515 is virtually identical in all material respects to the defective Arizona schemes." Id. at 46 (Huntley, J. dissenting); see also, Charboneau at 72 (Bistline, J. dissenting).

This is a direct and obvious conflict between the Supreme Court of Idaho and the Ninth Circuit. Other courts have similarly split on the issue. Courts in the other judge-sentencing states of Arizona, Nebraska and Montana have agreed with the Idaho Supreme Court;[3] but the Supreme Court of Oregon has held with the Ninth Circuit and struck down a previous death penalty statute for this reason, though primarily on state constitutional grounds. See State v. Quinn, 623 P.2d 630 (Ore. 1988).

This division among these lower courts involves an issue of the utmost importance. The Idaho Supreme Court's majority would restrict "the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts and the court as to the law," United States v. Battiste, 2 Sumner 240, 243 (1835) (Story, J.), contrary to centuries of English and

[3] See Harper v. Grammer, 654 F.Supp. 515 (D. Neb. 1987); State v. Smith, 665 P.2d 995, 1000 (Ariz. 1983); State v. Creech, 670 P.2d 763 (Id. 1983); Fitzpatrick v. State, 638 P.2d 1002, 1012 (Mont. 1981).

American jurisprudence.[4] The Ninth Circuit's Adamson decision would invalidate the death sentencing statutes of four states. See Brief of the States of Idaho, et al., Amicus Curiae, Ricketts v. Adamson, No. 88-1553 at 1. Certiorari should be granted here to resolve this conflict.

II.

CERTIORARI SHOULD BE GRANTED TO REVIEW THE STATE COURT'S DECISION APPROVING A DEATH SENTENCE IMPOSED AFTER DEFENSE COUNSEL PRESENTED NO EVIDENCE OR ARGUMENT AGAINST IMPOSITION OF THE DEATH PENALTY IN RELIANCE ON THE STATE'S WRITTEN NOTICE THAT THE DEATH PENALTY WOULD NOT BE SOUGHT.

The death sentence in this case was imposed through an extraordinarily unfair proceeding: the trial judge imposed that sentence sua sponte, although no evidence was offered by the prosecution in support of any aggravating factor, and no argument was made by the State in support of such a sentence. Prior to sentencing, the defense had been notified in writing, pursuant to court order, that the State would not be seeking or recommending the death penalty, and would not put on evidence of statutory aggravating factors to support the death penalty.

As a result, Petitioner's counsel was unaware that the death sentence was even at issue when she appeared at sentencing on Petitioner's behalf. Indeed, counsel was affirmatively misled into believing the death penalty--and the statutory aggravating and mitigating circumstances that would control the decision whether or not to impose the death penalty--were not at issue at that proceeding. Counsel had neither heard nor read the trial evidence that was used by the court to make its findings in aggravation; she had neither the ability nor the reason to address those facts as they could have influenced the sentencing court under the Idaho death penalty statute.

[4] This was the accepted rule by the Seventeenth Century: "Ad quaestionem facti non respondent Judices, ad quaestionem legis non respondent Juratores." See Forsyth, History of Trial by Jury 259 (1852); see Bushell's Case, 6 Howard State Trial 999, Vaughn's Rep. 135, 149 (1670). It has been called "the fundamental maxim acknowledged by the Constitution." Scott, Trial By Jury and the Reform of Civil Procedure, 31 HARV. L. REV. 669, 679 (1918). Accord, Maxwell v. Dow, 176 U.S. 581, 609 (dissenting opinion of Mr. Justice Harlan); 4 BLACKSTONE'S COMMENTARIES 350 (Louis Ed. 1900); THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 185 (1898).

Relying on the written notice filed by the prosecution, Petitioner's counsel argued only factors that she thought would influence a decision between determinate and indeterminate life sentences. Counsel did not attempt to rebut any of the statutory aggravating circumstances relevant to a death sentence since none were presented or argued by the State. Nor did counsel argue or present evidence of the mitigating circumstances necessary to outweigh the aggravating factors. The death penalty was not mentioned in argument by either the State or defense. (Tr. M.N.T., p. 317). This is a basic denial of due process under any standard.

In Gardner v. Florida, 430 U.S. 349, 358 (1977), this Court held:

> It is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even if the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding in which he is entitled to the effective assistance of counsel. Mempa v. Rhay, 389 U.S. 128; Specht v. Patterson, 386 U.S. 605. The Defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may not have a right to object to a particular result of the sentencing process.

438 U.S. at 358. Since Gardner, it has been clear that the "...fundamental principles of procedural fairness apply with no less force at the penalty phase of any criminal trial." Presnell v. Georgia, 439 U.S. 14, 16 (1978). At the core of this right to procedural due process is the "guarantee of an opportunity to be heard and its corollary, a promise of prior notice." L. Tribe, American Constitutional Law, pp. 550-51 (1978). The Sixth Amendment similarly includes a special requirement of notice of the nature of the charges in criminal prosecutions. Givens v. Housewright, 786 F.2d 1378 (9th Cir. 1986).

"A person's right to reasonable notice of the charge against him and an opportunity to be heard in his defense -- a right to his day in court -- are basic in our system of jurisprudence." In re Oliver, 333 U.S. 257, 273 (1948). Due process requires notice which includes disclosure of "the specific issues [the defendant] must meet." In re Gault, 387 U.S. 1, 33-34 (1967). A defendant is entitled to know the factual material on which the [decision

maker]...relies for decisions so that he may rebut it." Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 288 n.4 (1974). See also, In re Ruffalo, 390 U.S. 544 (1968).

Courts in other states have held that a lack of notice of the evidence to be submitted at a capital sentencing trial is fundamentally unfair.[5] See e.g., People v. Walker, 222 Cal. Rtpr. 169, 180 (1985); Wright v. State, 335 S.E. 2d 857, 863-864 (Ga. 1985); State v. Hamilton, 478 So. 2d 123, 129 (La. 1985); Greene v. State, 713 P.2d 1032, 1038 (Ok. 1985) (dictum).

The proceedings here go beyond a lack of notice to an affirmative misleading of counsel. Cf. Raley v. Ohio, 360 U.S. 423, 438-439 (1959). The misleading notice caused counsel to forego evidentiary development and argument which focused on the critical death penalty issues and, thereby, deprived Petitioner of his right to effective counsel, "the opportunity to participate fully, and fairly in the adversary factfinding process." Herring v. New York, 422 U.S. 853, 858 (1975).

Under the circumstances here, counsel was no more able to perform her duty than was counsel in Gardner who had no notice or knowledge of the information upon which the court relied for sentencing. See Gardner v. Florida, supra. The result is no less unconstitutional.

Certiorari is appropriate and necessary here to resolve the substantial conflict between the decision of the state court below and this Court's controlling precedents and the decisions of other courts recognizing the basic rules of procedural fairness abandoned in this case.

---

[5] Other courts have also held that a trial judge has no authority to interfere with the discretion of the prosecutor in its determination not to seek the death penalty, State v. Murphy, 555 P.2d 1110, 1112 (Ariz. 1976), and that the lack of notice to a defendant of the statutory aggravating factors upon which the state will rely to support a death penalty bars the sentencer from imposing the death penalty. State v. Timmon, 469 A.2d 46, 51 (N.J. 1983).

III.

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE COURT BELOW AND THE LOWER FEDERAL COURTS REGARDING THE RIGHT TO CONFRONTATION OF WITNESSES AT THE PENALTY PHASE OF A CAPITAL CASE.

In Mullaney v. Wilbur, 421 U.S. 684, 698 (1978), this Court stated:

> Where proof of specified facts may determine whether a Defendant will live or die, the constitutional requirements for the procedure controlling the proof cannot depend on the state's choice of the stage of the litigation at which the proof is to occur. If, as here, the determination of certain statutorily defined facts "may be of greater importance than the difference between guilt or innocence from any lesser crimes," the state cannot avoid the constitutional requirements for proof of those facts "by characterizing them as factors that bear solely on the extent of punishment."

Id.

In Woodson v. North Carolina, 428 U.S. 280, 305 (1976), this Court held that the capital sentencing is qualitatively different from other sentencing proceedings and therefore has a need for special reliability. In that case, this Court stated:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment however long. Death, in its finality, differs more from life imprisonment than a 100 year term differs from one only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, supra at 305.

Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982) applied these principles to find a right of confrontation at the sentencing phase of capital cases:

> [T]he focus of [the United States Supreme] Court's current capital sentencing decisions has been toward minimizing the risk of arbitrary decision making. [Citations omitted]. Whereas earlier cases had focused on the quantity of information before the sentencing tribunal, recently the court has shown greater concern for the quality of such information. Gardner v. Florida, 430 U.S. at 359, 97 S.Ct. at 1205. Thus, it has recognized the defendant's interest both in presenting evidence in his favor, Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed 2d 1 (1982); Lockett v. Ohio, supra, and in being afforded the opportunity to explain or rebut evidence offered against him. Gardner v. Florida, 430 U.S. at 263, 97 S.Ct. at 1207. Reliability in the fact finding aspect of sentencing has been a cornerstone of these decisions. Id. at 359-60, 362, 97 S.Ct. at 1205; Woodson v. North Carolina, 428 U.S. at 305, 96 S.Ct. at 2191.
>
> . . . .
>
> [T]he Supreme Court's emphasis in Gardner and other capital sentencing cases on the reliability of the fact-finding underlying the decision whether to impose the death penalty convince us that the right to cross-examine adverse witnesses applies to capital sentencing hearings. The Supreme Court has recognized cross-examination as "the greatest legal engine ever invented for the discovery of truth." California v. Greene, 399, U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed. 2d. 489 (1970) (quoting 5 J. Wigmore, Evidence, section 1367 (3rd Ed. 1940)).[fn]

Proffitt v. Wainwright, 683 F.2d at 1253.[6] Accord, Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), aff'd, 451 U.S. 454 (1981); Arnett v. Ricketts, 655 F. Supp. 1437 (Ariz. 1987).

Idaho's system conflicts markedly with these principles. Its statutory scheme--as interpreted by the Idaho Supreme Court and followed in this case--allows the sentence of death to be predicated upon rampant hearsay and other incompetent and unreliable evidence. State v. Creech, 105 Idaho 362, 368, 670 P.2d 463 (1983). See also, id. 105 Idaho at 378 (Huntley, J. dissenting). In this case, safeguards purportedly in place to assure the integrity of the sentencing procedure were nonexistent. Petitioner's counsel made a timely and appropriate motion for a formal hearing through "live witnesses" under Idaho Code § 19-2516. Nonetheless, in sentencing Petitioner to death the trial court considered the following hearsay information as a part of its pre-sentence investigation:

1. Mark Lankford's self-serving version of the robbery/homicide, given without oath or cross-examination for purposes of his presentence interview.

2. The opinions of the pre-sentence investigator on the credibility of Petitioner.

3. The complete file of Petitioner's Harris County, Houston, Texas, robbery conviction, which included within it a Houston police department offense report reciting the purported events of the robbery and conviction.

4. A motion to revoke probation filed on the 21st day of

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[6] The connection between the confrontation right and the reliability of the result was recognized well before Proffitt.

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the custodial right of confrontation, and helps assure the accuracy of the fundamental requirement for the kind of fair trial which is this country's constitutional goal. Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal process. But its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined.

Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (citations omitted) (emphasis in original).

June, 1983, in Harris County, Houston, Texas, alleging violation of conditions by Petitioner.

5. A statement by a fellow inmate in the Idaho County Jail, who alleged that he and Petitioner were in a physical altercation during Petitioner's pretrial incarceration.

The decision of the Idaho Supreme Court affirming that sentence conflicts directly with that of the Eleventh Circuit in Proffitt, and the other courts cited above. It raises a fundamental question about the requirement of reliability in capital sentencing proceedings consistently espoused by this Court. This Court should grant the Writ sought to resolve these conflicts and reaffirm that principle.

IV.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE STATE OF IDAHO AND THE NINTH CIRCUIT WHETHER THE IDAHO DEATH PENALTY STATUTE CREATES AN UNCONSTITUTIONAL PRESUMPTION OF DEATH UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

In Adamson v. Ricketts, supra, the Ninth Circuit also held the Arizona death penalty statute unconstitutional because it impermissibly placed the burden to prove sufficient mitigation on the defendant and thus imposed a presumption that death is the appropriate penalty. 865 F.2d at 1041-44. Adamson found that "a presumption of death conflicts with the requirement that a sentencer have discretion when faced with the ultimate determination of what constitutes the appropriate penalty." 865 F.2d at 1042.

Similarly, a panel of the Eleventh Circuit in Jackson v. Dugger, 837 F. 2d 1469, 1473-74 (11th Cir. 1988), held constitutionally impermissible a jury instruction which advised the jury that if it found an aggravating factor to exist, death resulted unless it was overridden by mitigating circumstances. Jackson found that by this instruction "the risk of infecting the jury's determination is magnified. An instruction that death is presumed to be the appropriate sentence tilts the scales by which the jury is to balance aggravating and mitigating circumstances in favor of the state." 837 F.2d at 1474.

The Idaho death penalty statute, like the jury instruction in Jackson v. Dugger and the Arizona statute, creates a presumption of death by placing the burden of proof of mitigating factors on

the defendant. The language of Idaho Code § 19-2515(c) unambiguously instructs the trial court that upon finding any aggravating circumstances, death is the appropriate penalty, "unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust." This vitiates the requirement of individualized sentencing and is unconstitutional under the Eighth and Fourteenth Amendments.

"Presumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect." Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 2d 39 (1979); Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1955, 85 L.Ed. 2d 344 (1985). When such a presumption is employed in a capital sentencing, the risk of infecting the ultimate determination is increased. Jackson v. Dugger, 837 F.2d at 1474. The Eighth and Fourteenth Amendments should not permit "the risk that death penalty will be imposed in spite of factors which may call for a less severe penalty". Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion).

"[T]he presumption in favor of death that arises from requiring that the defendant prove that mitigating circumstances outweigh aggravating circumstances, offends federal due process by effectively mandating death." Adamson v. Ricketts, 865 F.2d at 1043. The Idaho Supreme Court has specifically rejected this holding of the Ninth Circuit in Adamson. State v. Charboneau, No.16339 and 16741, at 43 (April 4, 1989). Certiorari should issue to resolve the clear conflict between the Ninth and Eleventh Circuits and the Idaho Supreme Court.

CONCLUSION

The writ of certiorari should issue and the judgment of the Idaho Supreme Court should be reversed.

Respectfully submitted,

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May 18, 1989.

APPENDIX A

15. Criminal Law ⇐1206.1(2)

Statutory capital punishment procedure was not unconstitutional for failure to limit testimony at sentencing hearing to live testimony, notwithstanding defendant's claims that it was essential to allow cross-examination and rebuttal of adverse sentencing evidence because of possibility that trial court was prejudiced and that statute allowed rampant use of hearsay and other inadmissible information.

16. Homicide ⇐354

Record indicated that trial court described mitigating factors that it considered in imposing death sentence for first-degree murder, including the factual evidence presented in mitigation by defendant and arguments made in connection therewith, and court thereby complied with statutory requirement of analysis of all relevant factors, contrary to defendant's claim that court failed to consider in writing two mitigating factors produced at sentencing hearing. I.C. § 19-2515.

17. Criminal Law ⇐1144.10

A claim of ineffective assistance of counsel cannot be presumed by an appellate court. U.S.C.A. Const.Amend. 6.

18. Criminal Law ⇐641.13(2)

Defendant's claim that he was deprived of constitutional right to effective assistance of counsel in prosecution for first-degree murder was predicated on trial counsel's strategic and tactical choices to defend on theory that defendant was merely an "accessory after the fact" and defendant failed to demonstrate that he was denied reasonably competent assistance or that conduct of trial counsel contributed to conviction. U.S.C.A. Const.Amend. 6.

19. Judges ⇐49(1)

A judge cannot be disqualified for actual prejudice unless it is shown that the prejudice is directed against the litigant and is of such a nature and character that it would make it impossible for the litigant who presided both at t al of first-degree murder prosecution and defendant's motion for postconviction relief, of such a nature and character as would make it impossible for defendant to get a fair postconviction hearing, and defendant was not entitled to disqualify judge, where claimed grounds of bias were merely allegations that because judge had made prior rulings adverse to defendant, he was biased. Criminal Rules 25, 25(a, b); Rules Civ.Proc., Rule 40(d)(3).

21. Judges ⇐51(1)

Defendant failed to show that judge who presided in murder prosecution had become de facto material witness as to conduct of trial by defense counsel, and was therefore barred from presiding at hearing of postconviction motions, since judge was not subpoenaed as a witness and did not testify in postconviction proceedings and stipulation of facts which parties believed that judge might testify to if he had been called as a witness was insufficient to establish that he was in fact a material witness.

22. Criminal Law ⇐998(6)

Trial court did not abuse its discretion in denying defendant's motion for postconviction relief subsequent to murder prosecution, seeking to have court order psychological and physical examinations of defendant, where trial counsel made decision not to move for psychological and physical evaluation based on theory of defense that defendant was only an "accessory after the fact" and such tactical decision was properly not reviewed in hindsight on motion for postconviction relief.

23. Criminal Law ⇐998(1)

Trial court did not abuse its discretion in denying defendant's postconviction motion to compel alcohol evaluation of his trial counsel, absent any factual basis in record for court to order requested evaluation.

24. Homicide ⇐354

Sentence of death for two counts of

arbitrary imposition of death penalty, where evidence at trial supported jury's finding of guilt and court considered numerous statutory aggravating circumstances as well as mitigating circumstances, setting forth extensive rationale for why death penalty was imposed. I.C. §§ 19-2515, 19-2515(g).

25. Homicide ⇐354

Evidence was sufficient to support trial court's finding of statutory aggravating circumstances, for purposes of imposition of death penalty for first-degree murder. I.C. §§ 19-2515, 19-2515(g).

26. Homicide ⇐354

Sentence of death imposed on defendant following his conviction for two counts of first-degree murder was not excessive or disproportionate to penalty imposed in similar cases, considering both crime and defendant, where defendant not only participated in murders but did nothing to prevent codefendant from bludgeoning second victim after witnessing attack on first victim and where character and nature of defendant led to conclusion that he was an extremely dangerous person. I.C. § 19-2827.

Fitzgerald, Sims & Fisher, Lewiston, for appellant. Joan M. Fisher (argued).

Jim Jones, Atty. Gen., Boise, for respondent. Solicitor Gen. Lynn E. Thomas (argued).

BAKES, Justice.

Bryan Lankford was convicted by a jury of two counts of first degree murder for the killings of Robert and Cheryl Bravence. Following the trial, the district court held a sentencing hearing and sentenced the defendant to death. Lankford appeals this conviction and sentence and the district court's denial of his petition for post conviction relief before the same court, which was denied after a hearing. The appeals have been consolidated pursuant to I.C.

Evidence at trial disclosed that in June, 1983, Lankford was living in Texas on probation for a robbery conviction. Lankford was arrested for a DUI violation. Fearing that this violation of his probation would lead to his imprisonment, he fled the state with his older brother, Mark Lankford, in the latter's car. The pair eventually made their way to Idaho County, where they camped in the forest near Grangeville. They concluded that, because the monthly payments on Mark Lankford's car were delinquent, the police would be searching for it and that they needed to abandon the car to avoid capture. They left the car in the woods covered with brush and set off to steal another car.

The brothers came upon the Bravences' campsite and decided to take the Bravences' van. Bryan Lankford walked into the camp armed with a shotgun and engaged the Bravences in conversation. Subsequently, Mrs. Bravence left the group and went to a nearby creek. At this point, Mark Lankford ran into the campsite and ordered Robert Bravence to kneel down on the ground. While kneeling, Mark then hit Robert Bravence over the head with a nightstick. Cheryl Bravence then came up from the creek, and Mark told her to kneel down on the ground and then hit her over the head with the same nightstick. The Bravences were beaten with such force that their skulls had to be reconstructed by an anthropologist before the cause of death could be scientifically determined.

The brothers loaded the bodies into the van and headed back into the forest. The bodies were removed from the van and concealed under branches and other debris a short distance from where the Lankfords had abandoned their car. Lankford and his brother then took the van and traveled through Oregon and California before abandoning it in Los Angeles. During their flight from the murder scene they purchased accommodations and food with

747 P.2d 710

STATE of Idaho, Plaintiff-respondent,

v.

Bryan Stuart LANKFORD, Defendant-appellant.

Bryan Stuart LANKFORD, Petitioner-appellant,

v.

STATE of Idaho, Respondent.

Nos. 15760, 16170.

Supreme Court of Idaho.

July 29, 1987.

Rehearing Denied Oct. 20, 1987.

Defendant was convicted in the District Court, Second Judicial District, Idaho County, George R. Reinhardt, III, J., of two counts of first-degree murder and sentenced to death. His petition for postconviction relief was denied. Defendant appealed. Subsequent to consolidation of appeals, the Supreme Court, Bakes, J., held that: (1) voir dire procedure utilized by trial court did not deny defendant's constitutional right to trial by fair and impartial jury; (2) imposition of death penalty despite fact that prosecutor did not seek such penalty was not an abuse of discretion; and (3) evidence was sufficient to support trial court's finding of statutory aggravating circumstances.

Affirmed.

Huntley, J., concurred and filed opinion.

Bistline, J., concurred only in affirming verdict, dissented and filed opinion.

1. Jury ⇐33(4)

Trial court's voir dire procedure in murder prosecution, stipulated to in advance by prosecution and defense counsel, did not deny defendant's constitutional right to trial by fair and impartial jury on

felt they could not fairly try case and thereafter conducted its own limited examination before permitting counsel to conduct balance of voir dire. U.S.C.A. Const. Amend. 6.

2. Constitutional Law ⇐268(2)
Criminal Law ⇐637

Fact that defendant was guarded while present at his murder trial did not raise question of fundamental constitutional error, and allowing uniformed sheriff's deputies to sit in courtroom with him was not a violation of due process, where defendant appeared in court in three-piece suit rather than in prison garb, with sheriff's officer sitting behind him. U.S.C.A. Const.Amend. 14.

3. Criminal Law ⇐822(1)

Where jury instructions, taken as a whole, correctly state the law and are not inconsistent, but may be reasonably and fairly harmonized, it will be assumed that jury gave due consideration to whole charge and was not misled by any isolated portion thereof.

4. Criminal Law ⇐822(1)

Jury instructions in first-degree murder prosecution, taken as a whole, correctly stated the law and were not inconsistent and were not so misleading and confusing that defendant was denied his right to fair trial. U.S.C.A. Const.Amend. 6.

5. Homicide ⇐311

Defendant in murder prosecution was not entitled to proposed jury instruction asking jury to render special verdict on intent, since judge was charged with determination of whether death sentence would be imposed, and hence with sufficiency of finding of intent to kill necessary to support death sentence, and proposed jury instruction therefore was an attempt to impermissibly shift trial court's duty to jury.

6. Homicide ⇐286(2)

Jury instruction in first-degree murder prosecution that "malice is implied when

and did not improperly relieve State of its obligation to prove intent as an essential element of murder, since murder committed during a robbery was by definition murder in the first degree and proof that murder occurred during commission of robbery merely was a substitute for specific proof of premeditation. I.C. § 18-4003.

7. Constitutional Law ⇐270(1)
Criminal Law ⇐1213.2(1)

Felony-murder statute did not violate prohibition against cruel and unusual punishment or due process by punishing conduct without requiring proof of mental state. U.S.C.A. Const.Amends. 8, 14; I.C. §§ 18-4003, 18-4003(d).

8. Criminal Law ⇐1147, 1208.2

Imposition of a sentence is within the sound discretion of the trial court and will not be disturbed by a reviewing court in the absence of an abuse of that discretion, and a sentence that is within prescribed limits of the sentencing statute will not ordinarily be considered an abuse of discretion.

9. Criminal Law ⇐42

Grant of immunity to defendant following his conviction of felony-murder but prior to sentencing, procured by State in order to obtain defendant's testimony against codefendant, his brother, did not deprive trial court of authority to sentence defendant, since none of the testimony given pursuant to immunity agreement was used to prosecute or punish defendant and agreement was only prospective in effect, protecting defendant from any other charges that might have been brought based on his use of murder victims' property. I.C. § 19-1114.

10. Criminal Law ⇐986.1

Trial court's denial of defendant's motion for continuance of sentencing hearing subsequent to conviction for first-degree murder, based on appointment of cocounsel and discharge of trial counsel, was not an abuse of discretion, where court made ex-

nesses at sentencing hearing and there was no showing that important witnesses were unavailable due to denial of motion.

11. Criminal Law ⇐986.2(1)

Pursuant to express provision of statute, evidence produced at defendant's murder trial was available for trial court's consideration at sentencing without necessity of its repetition, with regard to consideration of statutory aggravating circumstances. IC §§ 19-2515, 19-2515(c).

12. Criminal Law ⇐986.2(2)
Homicide ⇐354

Trial court did not abuse its discretion in imposing sentence different from that recommended by prosecuting attorney and imposing death penalty subsequent to murder conviction, notwithstanding failure of prosecutor to offer any additional evidence at sentencing hearing based on fact that he was not seeking death penalty, since trial court had responsibility for sentencing, evidence adduced at trial was available for court's consideration and evidence so used amply supported trial court's imposition of death penalty. I.C. §§ 19-2515, 19-2515 (c-e).

13. Homicide ⇐354

Prosecution's written notice that it would not seek death penalty subsequent to defendant's conviction of first-degree murder did not negate previously administered statutory notice that defendant might be sentenced to death, and court's express advice to defendant at arraignment that death penalty was possible sentence for crimes with which he was charged, as well as existence of death penalty statute in statute books, constituted sufficient notice of possible imposition of death penalty.

14. Criminal Law ⇐1213.7
Jury ⇐24

Capital punishment procedure did not violate prohibition on

Lankford's. Fearing that the authorities were closing in on them, they fled into a remote and inaccessible area of the state where they were ultimately discovered and captured. Among the items found with the Lankfords was a knife which had belonged to Mr. Bravence.

Although the Bravences' bodies were not found until late September, they had been reported missing and, upon discovering the van, the Los Angeles Police Department conducted a forensic examination of the vehicle. The examination turned up numerous incriminating items, including the Lankfords' fingerprints. The Los Angeles police then turned the investigation over to the Federal Bureau of Investigation.

After his arrest Lankford made numerous confessions regarding the killings, none of which were challenged on direct appeal.[1] These statements included two statements made to Texas law enforcement officers, several statements and a written confession to an FBI agent and, after an aborted suicide attempt, Lankford made another statement to an Idaho County deputy sheriff. After Lankford was extradited to Idaho, he was charged with two counts of first degree murder. An attorney was *appointed* to represent Lankford.

The trial was held in March, 1984. In the process of jury selection, in accord with a stipulation by the parties, the trial court separated from the venire all persons who had heard a significant amount of information about the case in order that the jury could be selected from people who had heard little of the case. Voir dire then took place as to the remaining jurors. No significant difficulty was experienced in selecting the jury.

Lankford's defense theory was that he was only an accessory after the fact. Lankford testified in his own behalf and stated that he was dominated by his older brother who was a violent and dangerous person. He testified that he thought his

testified that after the murders he was hysterical and remained in the van while his brother hid the bodies in the woods. The jury nevertheless found Lankford guilty of two counts of first degree murder.

Subsequent to conviction and sentencing, Lankford filed a petition seeking post conviction relief and moved to disqualify the district judge from presiding at the post conviction relief hearing on the basis of prejudice. The motion was denied. At the post conviction hearing, Lankford argued that his trial counsel had been ineffective for a number of reasons, including his failure to demand that Lankford be subject to a psychological and physical evaluation. The defendant further argued that the trial court had erred in failing to require trial counsel to be forced to submit to an alcohol evaluation. After a hearing, the court denied post conviction relief.

On appeal to this Court, Lankford raises twenty-two issues. Eight of these issues arose from the trial proceedings; nine of the issues questioned the sentencing procedure; two issues dealt with the post conviction relief proceeding; and three issues relate to this Court's statutorily required automatic review of a death sentence. While this Court has reviewed all twenty-two issues, we have found that some were not raised below and thus were not preserved for appeal. Several issues are closely related, and we have consolidated them. For the reasons set out below, we affirm the judgments and sentences.

I

Direct Appeal Issues

At the outset we note that the defendant appealing from a criminal conviction bears the burden of demonstrating error in the lower court. *State v. Wallace*, 98 Idaho 318, 563 P.2d 42 (1977). Furthermore, error will not be presumed on appeal but

served to merit review. *State v. Thomas*, 94 Idaho 430, 489 P.2d 1310 (1971).[2] Keeping in mind the standards of review set by our prior case law, we now turn to the issues.

A.

Lankford argues that the trial court failed to question jurors regarding the adverse effect of pretrial publicity, and therefore he was denied his constitutional right to a trial by a fair and impartial jury. Lankford acknowledges that no objection was raised below as to the *voir dire* process, and therefore the issue is not properly preserved for appeal, absent fundamental error. *State v. White, supra.* However, Lankford argues nevertheless that the failure to question jurors regarding pretrial publicity amounted to fundamental error.

[1] The trial court initially questioned jurors regarding pretrial publicity and, based upon a procedure agreed on in advance by counsel, then eliminated all those who felt that they could not fairly try the case.[3] Thereafter, the trial court conducted a limited *voir dire* examination and the balance of the *voir dire* process was conducted by counsel. Lankford has not established any error, much less fundamental error, in the jury selection process. This Court has ruled that great latitude is to be allowed in examination of veniremen upon *voir dire*. *See State v. Pontier*, 95 Idaho 707, 518 P.2d 969 (1974); *State v. Bitz*, 93 Idaho 239, 460 P.2d 374 (1969). The *voir dire* procedure was established by stipulation of counsel, and there is no indication of any abuse of discretion by the trial court in the manner in which he exercised the *voir dire* examination. Accordingly, the claimed error is without merit.

B.

[2] Next, Lankford asserts that it was a "fundamental error" and a violation of due process for the trial court to allow uniformed sheriff's deputies to sit in the courtroom with him. We disagree. The fact that Lankford was guarded while present at the trial fails to raise the question of fundamental constitutional error. The record demonstrates that Lankford did not appear in prison garb, *State v. Crawford*, 99 Idaho 87, 577 P.2d 1135 (1978); rather, at trial he appeared in a three-piece suit. A sheriff's officer sat behind him. In *Holbrook v. Flynn*, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986), the United States Supreme Court addressed the issue of whether the presence of four uniformed and armed officers was so inherently prejudicial that the defendant was denied his constitutional right to a fair trial. Writing for the majority, Justice Marshall found that unlike cases which involved a criminal defendant being brought to trial in prison garb the presence of the uniformed troop-

2. The exception to the general rule is that this Court will review "fundamental error" on appeal even when no adequate objection has been interposed at trial. *State v. White*, 97 Idaho 708, 551 P.2d 1344 (1976), *cert. den.* 429 U.S. 842, 97 S.Ct. 118, 50 L.Ed.2d 111 (1976).

"'Error that is fundamental must be such error as goes to the foundation or basis of the defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to prevent him to waive. Each case will of necessity, under such a rule, stand on its own merits. Out of facts in each case will arise the law.' *See also*

attorneys, the district court judge requested all prospective jurors who "will not be in a position to serve as a result of bias, prejudice or undue influence or any other reason that they may be aware of" to raise their hands. Those veniremen who raised their hands were then sent to the back of the room, and the *voir dire* examination continued without calling those persons.

Although the procedures used by the district judge may not have been common practice, both counsel agreed in advance that the procedure was designed and reasonably calculated to assure a selection of an unbiased jury. Lankford's attorney, the prosecutor and the district court judge were all residents of Idaho County

ers did not prejudice the defendant. Justice Marshall stated:

"We do not minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's chances of receiving a fair trial. (Citations omitted.) But we simply cannot find an unacceptable risk of prejudice in the spectacle of four such officers quietly sitting in the first row of the courtroom's spectator section. (Footnote omitted.) Even had the jurors been aware that the deployment of the troopers was not common practice in Rhode Island, we cannot believe that the use of the four troopers tended to brand the respondent in their eyes 'with an unmistakable mark of guilt.'" *Holbrook v. Flynn*, 475 U.S. 560, 106 S.Ct. 1340, 1347, 89 L.Ed.2d 525 (1986) (citations omitted).

No error resulted from the fact that Lankford was guarded by law enforcement officers during his trial.

C.

Lankford next makes a broad based and comprehensive attack on the instructions which were presented to the jury. Lankford claims that the jury instructions as a whole misstated the law and were so misleading and confusing that the defendant was denied his right to a fair trial. In addition to claiming the instructions as a whole are erroneous, Lankford also attacks numerous individual instructions. Many of the errors claimed in the instructions were not addressed by objections during the trial and have not been properly preserved for this appeal. Absent a timely objection to the jury instructions, Lankford's assignments of error with respect thereto are not entitled to consideration on appeal. *State v. Watson*, 99 Idaho 694, 587 P.2d 835 (1978).

[3, 4] Where the jury instructions, taken as a whole, correctly state the law and are not inconsistent, but may be reasonably and fairly harmonized, it will be assumed that the jury gave due consideration to the whole charge and was not misled by any isolated portion thereof. *State v. Tope*, 86 Idaho 462, 387 P.2d 888 (1963). After reviewing the record we find that the instructions, either individually or as a whole, were not in error. We will deal specifically with two of Lankford's claims of error.

[5] First, Lankford argues that the district court erred when it refused defendant's Proposed Jury Instruction Number 4[4] that asked the jury to render a special verdict on the defendant's intent. The crux of Lankford's claim is that under the United States Constitution a defendant cannot be sentenced to death for felony murder without a finding of an *intent* to kill. However, in Idaho it is the judge and not the jury who makes the determination of whether the death sentence will be imposed. Accordingly, the district court did not err when it refused Lankford's Proposed Instruction No. 4 which attempted to impermissibly shift the trial court's duty to find an intent to kill to the jury.

[6] Lankford also argues that Instruction No. 17[5] was improper because it in-

4. "DEFENDANT'S REQUESTED INSTRUCTION NO. 4

....

"Answer this question only if you find the defendant, Bryan Lankford, guilty of Murder in the first degree.

Do you find, beyond a reasonable doubt that Bryan Lankford himself killed, attempted to kill, or had any intent to kill either of the victims in this case?"

5. "INSTRUCTION NO. 17

is done for a base, antisocial purpose, and with a wanton disregard for human life by which is meant, an awareness of a duty imposed by law not to commit such acts followed by the commission of the forbidden act despite that awareness, or when the killing is a direct and casual result of the perpetration or attempt to perpetrate a felony inherently dangerous to human life, specifically in this case robbery.

"The mental state constituting malice aforethought does not necessarily require any ill will

structed the jury that "malice is implied when the killing results from an act involving a high degree of probability that it will result in death...." Lankford argues that the instruction relieved the state of proving intent and since the state must prove each essential element of a crime beyond a reasonable doubt the jury instruction was erroneous and in effect diminished the state's burden of proof. We disagree. Contrary to Lankford's assertion, the instruction does not state that killing in perpetration of a robbery is malice *per se*. The instruction *does* advise the jury that malice can be implied in some situations. The United States Supreme Court has stated that:

"In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not *intend* to cause injury. [Citation omitted.] ....

"No one doubts that the trial court could properly have instructed the jury that it could *infer* malice from respondent's conduct. [Citation omitted.] Indeed, in the many cases where there is no direct evidence of intent, that is exactly how intent is established. For purposes of deciding this case, it is enough to recognize that in some cases that inference is overpowering. [Citation omitted.]" *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986). (Emphasis in original.)

Murder committed during the course of a robbery is, by definition, murder in the first degree. I.C. § 18-4003. Proof that the murder occurred during the commission of a robbery merely is a substitute for specific proof of premeditation on the theory that one who prepares for a robbery by making arrangements to use deadly force is guilty of acts as culpable as, and probably comprising, premeditation. *See* 40 Am. Jur.2d § 72, Felony-murder Generally.

D.

[7] Next, Lankford attacks the constitu-

der,[6] arguing that under *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), and its progeny the statute violates the 8th amendment prohibition against cruel and unusual punishment and the 14th amendment guarantee of due process by punishing conduct without requiring proof of a mental state. Lankford's argument has been considered by this Court at length in *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985), and *State v. Paradis*, 106 Idaho 117, 676 P.2d 31 (1984), and we have found the statute to be constitutional and in compliance with *Enmund*.

II

Sentencing Issues

[8] Imposition of a sentence is within the sound discretion of the trial court and will not be disturbed by a reviewing court in the absence of an abuse of that discretion, and a sentence that is within prescribed limits of the sentencing statute will not ordinarily be considered an abuse of discretion. *State v. Butler*, 95 Idaho 899, 523 P.2d 31 (1974). After reviewing the record, we find that the district court did not abuse its discretion in sentencing Lankford and that there were no significant errors in the sentencing procedure.

A.

[9] After Lankford was convicted of two counts of felony murder, but before sentencing, the state entered into an immunity agreement with him under I.C. § 19-1114 in order to obtain his testimony against his brother. Lankford contends that this grant of immunity (which was after the verdict but prior to his sentencing) deprived the district court of the authority to sentence the defendant. We conclude that the district court did not err when it found that the immunity agree-

ing two mitigating factors which were produced at the sentencing hearing was error that requires remanding for sentencing. The two mitigating factors which Lankford complains were not considered in writing by the district court are (1) that the prosecution recommended a sentence less than the death penalty, and (2) that the defendant had taken and substantially passed two polygraph tests that had been requested by the state. Lankford asserts that the sentencing statute, I.C. § 19-2515, has been given a broad interpretation by the courts with the intent of ensuring that a thorough and reasoned analysis of all relevant factors take place.

The record demonstrates that the district court described the mitigating factors that it considered in sentencing Lankford. Those mitigating factors included all of the factual evidence presented in mitigation by the defendant and the arguments made in connection with them. It is clear from the record that the district court judge complied with the requirements of I.C. § 19-2515.

III

Post Conviction Relief Issues

After sentencing and conviction, Lankford brought an action for post conviction relief in the district court. After an extended hearing, the district court made findings denying this petition. A denial of post conviction relief will not be disturbed on appeal where there is substantial competent evidence supporting the denial. *State v. Hinkley*, 93 Idaho 872, 477 P.2d 495 (1970). After reviewing the record of the post conviction relief proceeding we find that there was substantial and competent evidence to support the district court's findings.

A.

Lankford first argues that he was deprived of his constitutional right to effective assistance of counsel in that his trial counsel failed to: (1) move for a change of venue; (2) adequately prepare for and conduct the *voir dire* which would allow the selection of a fair and impartial jury; (3) fully investigate and prepare the factual and legal basis for the defendant's case; (4) file motions to suppress constitutionally infirm statements taken of the defendant; (5) file a motion for psychiatric or psychological evaluation; (6) file a request for discovery; (7) research and raise viable defenses; (8) object to the defendant being compelled to go to trial under heavy guard; (9) request a limiting instruction on the use of prior inconsistent statements; (10) object to irrelevant, immaterial and prejudicial evidence; (11) request a limiting instruction on impeachment by prior felony conviction; (12) object to erroneous instructions. Lankford concludes that these errors and omissions of the trial counsel require a reversal of the defendant's convictions. However, we conclude that the record does not support the allegations.

[17] A claim of ineffective assistance of counsel cannot be presumed by an appellate court. *State v. Elisondo*, 97 Idaho 425, 546 P.2d 380 (1976). We have examined an extensive record in which the parties explored in detail the basis for Lankford's allegations through witnesses and affidavits and through direct and cross examination. A review of this record clearly establishes that Lankford was not deprived of the right to effective assistance of counsel. The United States Supreme Court has stated that the test to be applied to a claim of ineffective assistance of counsel is whether counsel's conduct so undermined the proper function of the adversarial process that the trial court cannot be relied on as having produced a just result. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Also see Burger v. Kemp*, — U.S. —, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987). This issue has been extensively litigated in Idaho. In *Estes v. State*, 111 Idaho 430, 725 P.2d 135 (1986), we summarized the existing law as

entitled to the reasonably competent assistance of an attorney. *State v. Tucker*, 97 Idaho 4, 8, 539 P.2d 556, 560 (1975). *Accord Strickland v. Washington*, 466 U.S. at 686, 104 S.Ct. at 2064. 'A showing that defendant was denied the reasonably competent assistance of counsel is not sufficient by itself to sustain a reversal of the conviction. The defendant, in most cases, must make a showing that the conduct of counsel contributed to the conviction or the sentence imposed.' *State v. Tucker*, 97 Idaho at 4, 539 P.2d at 564 (1975); *see also State v. Tisdel*, 101 Idaho 52, 54, 607 P.2d 1326, 1328 (1980). We have also repeatedly stated that we will not attempt to second-guess strategic and tactical choices made by trial counsel. *State v. Larkin*, 102 Idaho 231, 233, 628 P.2d 1065, 1067-68 (1981); *State v. Tucker*, 97 Idaho at 10, 539 P.2d at 562.

"These standards, articulated by both the United States Supreme Court and this Court, must be used to determine whether Estes received effective assistance of counsel. As the Supreme Court has stated, 'A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time.' *Strickland v. Washington*, 466 U.S. at 689, 104 S.Ct. at 2065. The presumption in evaluating attorney effectiveness is that the attorney is competent and that his actions represent sound trial strategy. A defendant shoulders a difficult burden when he seeks to assert ineffective assistance of counsel." *Estes v. State*, 111 Idaho at 434, 725 P.2d at 139 (footnote omitted).

[18] At the post conviction relief hearing, Lankford's trial counsel testified that the extensive physical evidence, Lankford's numerous admissible confessions, and the verbal testimony which would be produced by the prosecution at trial was sufficient to convict Bryan Lankford of first degree murder. He stated that after evaluating this evidence he determined that Lankford's best opportunity to avoid a first degree murder conviction was to defend on the theory that Lankford was an "accessory after the fact." All of the charges against Lankford's counsel are a direct result of the trial counsel's strategic and tactical choices to defend Lankford on the "accessory after the fact" defense. Because it is not the function of a reviewing court to substitute its judgment or that of a substitute counsel for the strategic and tactical choices of the trial counsel, *State v. Larkin*, 102 Idaho 231, 233, 628 P.2d 1065, 1067-68, Lankford's new counsel must do more than demonstrate that alternative strategies were available which might have been better. In sum, none of the numerous charges made by the defendant against his trial counsel demonstrate that (1) Lankford was denied the reasonably competent assistance of counsel, and (2) that the conduct of his trial counsel contributed to his conviction.

B.

[19] Next, Lankford claims that the district court erred in denying defendant's motion to disqualify the court for prejudice.[8] Following conviction and sentencing, the defendant moved to disqualify for cause the trial judge from the post conviction relief proceeding pursuant to I.R.C.P. 40(d)(3)[9] and I.C.R. 25(b).[10] Lankford's at-

8. The record demonstrates that Lankford's counsel made it clear that the motion to disqualify was *for cause* and was not brought under I.C.R. 25(a) permitting peremptory disqualification. (Tr., post conviction relief proceedings, p. 20.) We note that I.C.R. 25(a) is not available to

an affidavit of the party or his attorney stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion. Such motion for disqualification for cause must be made not later than 5 days after service of a notice setting the action

the state and Lankford did not immunize Lankford from sentencing for the crimes for which he had already been convicted when the agreement was entered into.

I.C. § 19-1114 states in part that, "If ... the person would have been privileged to withhold the answer given ... that person shall not be prosecuted or subject to penalty ... *on account of any fact or act concerning which ... he answered.*" (Emphasis added.) By its clear wording, the statute does not apply in this case. None of the testimony given by Lankford pursuant to the immunity agreement was used to prosecute or to punish Lankford.[7] Instead of providing retroactive protection, the immunity agreement was prospective in effect and protected Lankford from any other charges that might have been brought pursuant to his use of the Bravences' property.

B.

[10] Next Lankford argues that the district court erred when it denied his motion for a continuance of the sentencing hearing. The relevant facts show that Lankford made a motion to have co-counsel appointed. The motion was granted and additional counsel was appointed; however, the district court warned Lankford and the newly appointed counsel that granting the motion would not automatically lead the court to grant a motion for continuance. On October 10, 1984, the new co-counsel moved to discharge the trial counsel; this motion was also granted and the district court once again warned Lankford that granting the motion would not automatically lead to a continuance.

"A decision to grant or deny a motion for continuance is vested in the sound discretion of the trial court." *State v. Ward*, 98 Idaho 571, 574, 569 P.2d 916, 919 (1977). Absent a showing that the appellant has shown that his substantial rights have been prejudiced, or that the district court abused its discretion, we will not reverse a denial of a motion for continuance. *See State v. Laws*, 94 Idaho 200, 485 P.2d 144 (1971).

The motion for a continuance was not arbitrarily denied. The record demonstrates that the district court made extensive findings into the information available to Lankford's attorney for sentencing purposes. Lankford's new attorney had adequate information and called numerous witnesses at the sentencing hearing. There was no showing that important witnesses were unavailable due to the denial of the motion. The state was prepared for the scheduled hearing, brought in witnesses, and incurred significant expenses, while no prejudice to Lankford was shown. In *State v. Brown*, 98 Idaho 209, 212, 560 P.2d 880, 883 (1977), we stated that "a defendant may not indefinitely postpone trial or sentencing by continually changing counsel...."

C.

[11, 12] Lankford contends that the district court erred in imposing the death penalty where the prosecution offered no evidence in support of the statutory aggravating circumstances set forth in I.C. § 19-2515. At sentencing, the prosecutor did not seek the death penalty, and therefore he did not offer any additional evidence at the sentencing hearing. It is Lankford's contention that the evidence produced at trial was not available to the judge for purpose of sentencing, and therefore the district court had no evidence with which to find the statutorily required aggravating circumstances. However, I.C. § 19-2515(c) expressly provides, "Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing." The evidence that was used at the sentencing hearing by the trial court judge amply supported the trial court's conclusion. The trial court is entrusted with the responsibility for sentencing in Idaho, I.C. § 19-2515(c), (d), (e); *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), *cert. den.*, 465 U.S. 1051, 104 S.Ct. 1327, 79 L.Ed.2d 722 (1984), and therefore the district court was not bound by the recommendations of the prosecuting attorney. In *State v. Kohoutek*, 101 Idaho 698, 619 P.2d 1151 (1980), we held that there was no abuse of a district court's discretion when it proposed a sentence different from that recommended by the prosecuting attorney. The district court had sufficient evidence before it and did not abuse its discretionary authority to sentence the defendant.

D.

[13] Next, Lankford contends that the district court erred when it failed to notify the defendant of the possibility of the imposition of the death penalty. After the verdict was rendered, and in preparation for sentencing, the district court ordered the prosecution to give written notice on whether it would seek the death penalty. The prosecution responded that it would not. Lankford argues that the prosecution's written notice negated the statutory notice that he might be sentenced to death. We disagree.

7. Lankford asserts that the district court judge used the immunized testimony in its findings of fact to support the imposition of the death penalty. However, the record does not support that assertion. While the district court described Lankford's testimony at his brother's motion for new trial in its sentencing memorandum, it was not considered as an aspect of any of the statutory aggravating circumstances found by the court. During the district court's oral discussion of the sentence, the judge stated:

"The defendant has shown no remorse for his

October 10, 1984 in the companion case, *State v. Mark Lankford*, Idaho County Case No. 20158, that he called the *Lewiston Tribune* and claimed that it was he alone who murdered the Bravences. This he later denied and offered the explanation which is set forth in the addendum to the presentence investigation report under date of October 3, 1984, to the effect that it was simply part of a plan that would secure freedom for his brother, who could in turn free him."

Although it is true that the district court judge

charged with. Additionally, the United States Supreme Court has pointed out that the "existence [of a death penalty statute] on the statute books provides fair warning as to the degree of culpability which the state ascribed to the act of murder." *Dobbert v. Florida*, 432 U.S. 282, 298, 97 S.Ct. 2290, 2300, 53 L.Ed.2d 344 (1977). Lankford has not cited us to any authority which supports his position that he was entitled to greater notice than that given by the statutes and by the district court.

E.

Next, Lankford attacks the constitutionality of Idaho's capital punishment procedure, arguing generally that I.C. § 19-2515 violates the eighth amendment's prohibition on cruel and unusual punishment and the sixth amendment's right to a trial by jury because the statute does not require jury participation in the sentencing procedure. Furthermore, Lankford contends that I.C. § 19-2515(d) is specifically unconstitutional under both Idaho and United States Constitutions because it does not require the district court to limit the testimony at the sentencing hearing to live testimony. Lankford argues that it is essential that a defendant be allowed to cross examine and rebut adverse sentencing evidence because of the possibility that the trial court is prejudiced and that the Idaho statute allows rampant use of hearsay and other inadmissible information.

[14, 15] The issue of jury participation has been resolved in Idaho in *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), and *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981), and approved under the United States Constitution in *McMillan et al. v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). The issues of hearsay testimony and defendant's right to cross examine or confront adverse testimony has likewise been resolved against appellant's position. *See State v. Osborn*, *supra*.

torney filed the affidavit of prejudice and no counter affidavit was filed.[11] The motion was denied. The parties later stipulated to facts which they believed the trial judge could testify to if called as a witness.[12] The stipulation (which was not based on actual testimony) stated that the judge had knowledge that Lankford's trial counsel had been arrested for DUI and that the judge had received a letter from the defendant requesting a new counsel based on allegations of alcohol abuse, and this letter led to the appointment of co-counsel. The stipulation was received into evidence and then defense counsel reargued its motion asserting that because of the stipulation the trial judge was now a material witness in the case and must be disqualified. This motion was also denied.

Lankford argues that the affidavit and the stipulation were legally sufficient to show prejudice and that the case should be remanded with directions that the trial judge disqualify himself and the matter reassigned. In Idaho a judge cannot be disqualified for actual prejudice unless it is shown that the prejudice is directed against the litigant and is of such a nature and character that it would make it impossible for the litigant to get a fair trial. *State v. Waterman*, 36 Idaho 259, 210 P. 208 (1922).

[20] Lankford's affidavit claimed bias on the following grounds: (a) that the district court judge presided in the trial that found Lankford guilty of two counts of first degree murder; (b) that the judge had previously ruled on motions for continuance, new trial, alleged ineffective assistance of counsel, and sentencing; (c) that by presiding in the above matters it would be unreasonably difficult for the judge to impartially determine questions of fact raised in the affiant's petition for post conviction relief; (d) that in assessing the death penalty the judge made findings that Lankford is not a credible person; (e) that Lankford is a material witness in the post confiction relief action and because the judge has determined that he is not a credible witness he will not receive an unbiased determination of his credibility; (f) that Lankford had reason to believe that the district court judge may be a material witness to the factual allegations supporting the claim of ineffective assistance of counsel; (g) that at the affiant's sentencing hearing the district court judge elicited testimony to support the court's findings of fact in a leading manner, and thereby showed his bias and prejudice against Lankford; (h) that the district court judge on his own motion caused testimony favorable to the affiant (results of polygraph examination which showed Lankford to be truthful on material facts) to be stricken and removed from the jury's consideration; (i) that there is extreme community hostility and prejudice toward Lankford in Idaho County and that this community feeling makes it unreasonably difficult for the judge, who is a resident of the community and an elected official, to impartially hear the affiant's petition; (j) that because the judge found the offenses of which Lankford was convicted to be heinous, atrocious, and exhibiting an utter disregard for human life he could not now determine the merits of Lankford's petition in a neutral, detached, dispassionate and impartial manner; (k) because the issues raised in the petition for post conviction relief directly affect the judgment of the district court judge, it is impossible for the trial court to be impartial; (*l*) that the district court judge has attached an emotional commitment to the "correctness" of his initial determination and cannot render an impartial determination on the merits of Lankford's position; and (m) that a trial court having presided at the trial and sentencing cannot reasonably be expected to determine matters raised relating to said conviction and sentence in an impartial manner.

Lankford's allegations of bias do not show any actual prejudice on the part of the judge directed toward Lankford of such a nature and character that it would have made it impossible for Lankford to get a fair post conviction hearing. Many of the grounds listed above, stated separately or concurrently, do nothing more than state facts that simply explain the course of events involved in a criminal trial. The remaining grounds are mere allegations

court such motion may be made by a party not later than 5 days after service of the notice setting the action for re-trial. The presiding judge or magistrate sought to be disqualified shall grant or deny the motion for disqualification upon notice and hearing in the manner prescribed by these rules for motions."

10. "**Rule 25. Disqualification of judge.**— . . .

"(b) Disqualification for cause. Any party to an action may disqualify a judge or magistrate from presiding in any action upon any of the following grounds:

"(1) That he is a party, or is interested, in the action or proceeding.

"(2) That he is related to either party by consanguinity or affinity within the third degree, computed according to the rules of law.

"(3) That he has been attorney or counsel for any party in the action or proceeding.

"(4) That he is biased or prejudiced for or against any party or his case in the action.

12. The stipulation reads: "Comes now, attorney for Petitioner, Joan Fisher and attorney for Respondent, Henry R. Boomer, do hereby stipulate and agree that if the Honorable George R. Reinhardt was to testify in this matter, he would say the following: One, that prior to attorney W.W. Longeteig's appointment as counsel for Bryan Stuart Lankford in Case No. 20157, Judge George R. Reinhardt believed that W.W. Longeteig had either pled guilty, been arrested, or was convicted of driving under the influence of alcohol on more than one occasion, and based upon that, Reinhardt felt that W.W. Longeteig had a problem with alcohol.

"Two, that on July 28, 1984, George Reinhardt received certain correspondence from Bryan Lankford which is attached hereto—which is not, because we were not putting it in writing, but it was a motion that was before the court, which the court ruled upon and appointed co-counsel. And with reference to the allegations concerning alcohol, and based upon paragraph

[21] Finally, Lankford's allegation that the district court judge had become a *de facto* material witness in the case and was therefore barred from participation in the case is without merit. The record demonstrates that the district court judge was not subpoenaed as a witness and did not testify in the proceedings. A criminal defendant cannot turn the district court judge into a material witness by introducing a stipulation of facts which the parties believe that the judge might testify to if he was in fact called as a witness. Thus, we reject Lankford's claim that the district court judge had become a material witness in the post conviction relief proceeding.

C.

[22] Next, Lankford claims that the district court abused its discretion in the post conviction relief proceeding by denying two of Lankford's motions. First, Lankford moved to have the court order complete psychological and physical examinations conducted on himself. The court denied the motion. Then Lankford made a motion to compel an alcohol evaluation of the trial counsel. The court denied this request also. We find that the district court did not abuse its discretion in denying the motions. The testimony clearly indicates that Lankford's trial counsel made the decision not to move for psychological and physical evaluation of the defendant based on the strategy of claiming that Lankford was not involved in the crime but was only an "accessory after the fact." Such a tactical decision should not be reviewed in hindsight during post conviction relief. We find there was no abuse of discretion when the district court denied this motion.

[23] Regarding the motion to compel an alcohol evaluation of Lankford's trial counsel, there is no factual basis in the record for the court to order the alcohol evaluation. Lankford's trial counsel testified that he had not consumed alcohol while working

IV

Automatic Review

Pursuant to I.C. § 19-2827, all death sentences come to this Court on automatic review. The automatic review statute requires the Supreme Court to "consider the punishment as well as any errors enumerated by way of appeal." The statute requires this Court to undertake a three-part analysis to determine:

"(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

"(2) Whether the evidence supports the judge's finding of a statutory aggravating circumstance from among those enumerated in section 19-2515, Idaho Code, and

"(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." I.C. § 19-2827.

(1) ***Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.***

[24] Lankford argues that the death penalty was imposed under the influence of passion, prejudice and other arbitrary factors. The basis for Lankford's claim is his assertion that the community where the defendant was tried was outraged by the crime and that it is reasonable to believe that the district court was affected by the community's mood and that this environment led to the arbitrary imposition of the death penalty.

Contrary to Lankford's assertions, there is nothing in the record that indicates that the sentence of death was due to the influence of passion, prejudice or any other arbitrary factors. To the contrary, we find the trial was conducted in an error-free manner by a district court judge who sought every opportunity to provide Lankford with a fair trial. The jury instructions clearly informed the jury of the applicable law and the evidence presented at trial supports the jury's finding of two counts of first degree murder. The district court, after studying the presentence report and conducting an involved sentencing hearing in which the defendant produced witnesses and information favorable to his cause, made findings both in mitigation and in aggravation. In addition, the Court found numerous statutory aggravating circumstances as delineated under I.C. § 19-2515(g).[13] After laying the findings in mitigation and aggravation, the district court set forth extensive rationale for why the death penalty was imposed. This Court can find no error in the procedure followed by the district court in making its findings.

(2) ***Whether the evidence supports the judge's finding of a statutory aggravating circumstance from among those enumerated in Section 19-2515, Idaho Code.***

[25] Lankford argues that the evidence was insufficient to support the district court's finding of the statutory aggravating factors. Lankford claims that the evidence also failed to show (1) that the murder and the circumstances surrounding its commission demonstrated an utter disregard for human life; (2) that the defendant acted calmly or in a calculated manner; (3) that the defendant has a propensity to commit murder which will probably constitute a continuing threat to society; (4) that the defendant's acts were accompanied by a specific intent to kill.

After reviewing the complete record in this case, it is evident that the trial court's finding of the aggravating circumstances listed above were clearly supported by the evidence produced. Lankford's testimony clearly supports aggravating circumstances (1), (2) and (4).

(3) ***Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.***

[26] Finally, we have conducted our proportionality review as required by I.C. § 19-2827. To complete this process, we have reviewed the sentence imposed and the sentences imposed in similar cases in an effort to assure that the sentence in this case was not excessively disproportionate.[14] In making such a comparison, we have generally considered (1) the nature of and the motive for the crime committed; (2) the heinous nature of the crime; and (3) the nature and character of the defendant to determine whether the sentence was proportionate and just. After thoroughly examining the record and evaluating these factors, we find nothing that would indicate that the sentence of death imposed against Lankford was disproportionate or unjust.

13. "**19-2515. Inquiry into mitigating or aggravating circumstances—Sentence in capital cases—Statutory aggravating circumstances—Judicial findings.**— . . .

. . . .

"(g) The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed:

(1) The defendant was previously convicted of another murder.

(2) At the time the murder was committed the defendant also committed another murder.

(3) The defendant knowingly created a great risk of death to many persons.

(4) The murder was committed for remuneration or the promise of remuneration or the

(6) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.

(7) The murder was one defined as murder of the first degree by section 18-4003, Idaho Code, subsections (b), (c), (d), (e) or (f), and it was accompanied with the specific intent to cause the death of a human being.

(8) The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

(9) The murder was committed against a former or present peace officer, executive officer, officer of the court, judicial officer or prosecuting attorney because of the exercise

14. Those cases we have considered include: *State v. Johns*, 112 Idaho 873, 736 P.2d 1327 (1987); *State v. Stuart*, 110 Idaho 163, 715 P.2d 833 (1985); *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985); *State v. Scroggins*, 110 Idaho 380, 716 P.2d 1152 (1985); *State v. Fetterly*, 109 Idaho 766, 710 P.2d 1202 (1985); *State v. Bean*, 109 Idaho 616, 710 P.2d 526 (1985); *State v. Aragon*, 107 Idaho 358, 690 P.2d 293 (1984); *State v. Bainbridge*, 108 Idaho 273, 698 P.2d 335 (1985); *State v. Paradis*, 106 Idaho 117, 676 P.2d 31 (1983); *State v. Gibson*, 106 Idaho 54, 675 P.2d 33 (1983); *State v. Sivak*, 105 Idaho 900, 674 P.2d 396 (1983); *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983); *State v. Major*, 105 Idaho 4, 665 P.2d 703 (1983); *State v. Mitchell*, 104 Idaho 493, 660 P.2d 1336 (1983), *cert. den.*, 461 U.S. 934, 103 S.Ct. 2101, 77 L.Ed.2d 308 (1983); *State v. Carter*, 103 Idaho 917, 655 P.2d 434 (1982); *State v. Olin*, 103 Idaho 391, 648 P.2d 203 (1982); *State v. Stormoen*, 103 Idaho 83, 645 P.2d 317 (1982); *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981); *State v. Griffiths*, 101 Idaho 163, 610 P.2d 522 (1980); *State v. Padilla*, 101 Idaho 713, 620 P.2d 286 (1980); *State v. Fuchs*, 100 Idaho 341, 597 P.2d 227 (1979); *State v. Needs*, 99 Idaho 883, 591 P.2d 130 (1979); *State v. Lindquist*, 99 Idaho 766, 589 P.2d 101 (1979); *State v. Bradley*, 98 Idaho 918, 575 P.2d 1306 (1978); *State v. Birrueta*, 98 Idaho 631, 570 P.2d 868 (1977); *State v. Allen*, 98

527 P.2d 487 (1974); *State v. Hatton*, 95 Idaho 856, 522 P.2d 64 (1974); *State v. Standlee*, 96 Idaho 165, 525 P.2d 360 (1974); *State v. Foley*, 95 Idaho 222, 506 P.2d 119 (1973); *State v. Beason*, 95 Idaho 267, 506 P.2d 1340 (1973); *State v. Atwood*, 95 Idaho 124, 504 P.2d 397 (1972); *State v. Sanchez*, 94 Idaho 125, 483 P.2d 173 (1971); *State v. Gomez*, 94 Idaho 323, 487 P.2d 686 (1971); *State v. Dillon*, 93 Idaho 698, 471 P.2d 553 (1970), *cert. den.*, 401 U.S. 942, 91 S.Ct. 947, 28 L.Ed.2d 223 (1971); *State v. Radabaugh*, 93 Idaho 727, 471 P.2d 582 (1970); *State v. Rodriguez*, 93 Idaho 286, 460 P.2d 711 (1969); *State v. Jiminez*, 93 Idaho 140, 456 P.2d 784 (1969); *King v. State*, 93 Idaho 87, 456 P.2d 254 (1969); *State v. Gonzalez*, 92 Idaho 152, 438 P.2d 897 (1968); *State v. Chaffin*, 92 Idaho 629, 448 P.2d 243 (1968); *Carey v. State*, 91 Idaho 706, 429 P.2d 836 (1967); *State v. Koho*, 91 Idaho 450, 423 P.2d 1004 (1967); *State v. Anstine*, 91 Idaho 169, 418 P.2d 210 (1966); *State v. Gish*, 87 Idaho 341, 393 P.2d 342 (1964); *State v. Clokey*, 83 Idaho 322, 364 P.2d 159 (1961); *State v. Burris*, 80 Idaho 395, 331 P.2d 265 (1958); *State v. Snowden*, 79 Idaho 266, 313 P.2d 706 (1957); *State v. Buchanan*, 73 Idaho 365, 252 P.2d 524 (1953); *State v. Owen*, 73 Idaho 394, 253 P.2d 203 (1953) (considered only in terms of crime committed and penalty imposed; overruled on substantive law point in *State v. Shepherd*, 94

Lankford, as described by Bryan Lankford. The majority opinion recites that "Lankford testified that he did not intend that the Bravences die," which is correct. He also testified that he did not know in advance what Mark Lankford had in mind, other than the stealing of a vehicle:

> The Defendant testified at his trial that he and his brother decided to leave Idaho because it got cold ... He further testified that his brother, Mark Lankford, decided to steal a van and talked Defendant into going along with the theft.... The Defendant testified that he never planned on shooting anyone, though he did carry the shotgun into the campsite at his brother's request.... He then testified that while he was talking to the man (Robert Bravence), Mark Lankford came out of the bushes and told the man to get down on the ground.... Mark Lankford then hit the man over the head with a club.... When Mrs. Bravence came up from the river, Mark Lankford told her to get down on the ground and upon doing so, Mark Lankford hit her across the back of the neck.... The Defendant and Mark Lankford then picked up the Bravences and placed them into the van. ... The Defendant then drove the van back to the Lankford's former campsite. ... Upon arriving at the area, the Defendant stayed in the car because he was "hysterical", "crying and very upset" while Mark Lankford took the people into the woods.... The Defendant did not think that the people were dead at the time that Mark Lankford carried them into the woods.... The Lankfords then drove to Oregon.... The Defendant further testified that he signed charge receipts at the Holiday Inn in Wilsonville and other places because his brother told him to do so.... The Defendant further testified that Mark did not generally get along with people because he was violent and had a very bad temper most of the time. Defendant's Brief, pp. 6-7.

The foregoing is excerpted from the Defendant's Brief. It compares favorably with the majority's recitation, pp. 691-692, 747 P.2d pp. 713-714.

There is here, then, no contention, and also no jury finding, that Bryan Lankford delivered any of the death blows.[2] The majority upholds the imposition of the death penalty upon being able to see validity in the judge's finding, as rewritten by the majority, that Bryan Lankford "intended that the Bravences die." This misstatement of what the trial judge actually wrote is blatant and inexcusable, but serves the majority's purpose in choosing language which the majority prefers to believe was what the district judge really meant to say—so as to be brought in conformance with *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140—which is barely mentioned in the majority opinion,[3] although it was thoroughly discussed in the *Windsor* majority opinion, *Windsor, supra*, 110 Idaho at 418-19, 716 P.2d 1182.

The majority closes its cursory proportionality review with a quotation from *State v. Aragon*, which is delivered much as a blessing might be:

> We acknowledge the trial court's superior ability to observe witnesses and their demeanor during the sentencing phase of a trial, and especially the unique ability of the trial judge to observe the character and demeanor of the defendant, a tool essential to the ultimate goal of tailoring a sentence to a particular defendant. With that unique ability of the trial court in mind, we have determined that the sentence imposed in the present case is not out of proportion to the sentence heretofore imposed. *State v. Aragon*, 107 Idaho 358, 369, 690 P.2d 293, 304 (1984).

The Court's opinions in the cases of *Windsor* and *Scroggins* failed to acknowledge

the trial court's superior ability, and did not keep in mind that "unique ability." To the contrary, the Court, in *Windsor* and also in *Scroggins*, came out with a "newly enunciated doctrine of" paramount exercise of discretion which resulted in a Supreme Court "'qualitative review' of the record" from which "the Supreme Court determined that the sentence of death in the *Windsor* and *Scroggins* cases were excessive and disproportionate." Those quotations are, of course, taken directly from the eloquent order of disqualification authored by the Honorable Edward J. Lodge, the district judge who presided in the *Windsor* case and also in the *Scroggins* case, where in both cases he had imposed a sentence of death. Judge Lodge wrote courageously and concisely on the requirement of proportionality, and this Court's debasement of that doctrine. And Judge Lodge wrote from a position where only he was best positioned to make an assessment that was direly in need of being made. He had also, using his own words, "accepted that awesome responsibility" in imposing the death sentence on Fetterly, who was Windsor's co-defendant charged, tried, and convicted for the murder of Sterling Grammer, and also in imposing the death penalty on Beam, who was Scroggins' co-defendant charged, tried, and convicted for the murder of thirteen-year-old Mondi Lenten. Because the issue presently under address is proportionality, and because on previous occasions I have been impelled to the view that Idaho will only achieve any degree of reasonable proportionality in capital sentencing by restoring to the jury "that awesome responsibility," it is clearly in order that in Judge Lodge's own words the circumstances of *Windsor* and *Scroggins* be submitted to a candid world:

> "Idaho Code Section 19-2827(c)(3) is seemingly clear in providing that the responsibility of this state's Supreme Court in reviewing a death sentence is to ascertain whether a death penalty is 'excessive' or 'disproportionate to the penalty imposed

an 'independent review.' With all due respect, it is difficult for this court to believe that such a 'qualitative review' undertaken by the Supreme Court is more legitimate than the trial court's assessment after having personally participated in all the proceedings and having had the firsthand opportunity to evaluate the facts, circumstances, and persons involved in a capital case, particularly when two members of the Supreme Court are predisposed to find against the legitimate imposition of a death sentence when it is prescribed by the court as opposed to a jury. Rather, the decision-making responsibility always has been and always should be in the trial court, and only when there is determined to be an *abuse* of that discretion should an appellate court intercede. The United States Supreme Court held in *Spaziano vs. Florida*, [468 U.S. 447] 104 S.Ct. 3154 [82 L.Ed.2d 340] (1984), that sentencing by a trial judge satisfied both the Sixth and Eighth Amendments because 'a trial judge is more like a jury than he is like an appellate court. Like a jury, he has seen the witnesses and is well positioned to make those determinations of demeanor and credibility that are peculiarly within a trial judge's province.' The same can be said for all the nuances involved in the trial of a capital case which are not 'in the record,' but which are within the observations and knowledge of the trial judge, including community outrage and/or tolerance, community expectations and societal goals, the rights and needs of a victim's family, and the totality of the circumstances surrounding the defendant.

"The records in the *Windsor* and *Scroggins* cases amply support the determination that both defendants *personally intended that their victims suffer death*, a finding made by both the trial court and the jury which satisfies the Eighth Amendment as well as the rule of *Enmund vs. Florida*, 45 [458] U.S. 782 [102 S.Ct. 3368, 73 L.Ed.2d 1140] (1982). Yet, *even though findings regarding the personal responsibility and*

In this case, Lankford was found guilty of a savage murder against two innocent campers who were selected because they owned a van which the defendant intended to steal. Lankford came into their camp wielding a shotgun which must have ultimately led to Mr. Bravence's (who was a captain in the United States Marine Corps) subservient compliance with Lankford's brother's order to kneel on the ground where he was bludgeoned to death. Jurors could reasonably have inferred that Mr. Bravence complied with the demand to kneel on the ground because of the defendant's menacing display of the shotgun. After Mr. Bravence was mortally wounded, Mrs. Bravence returned from the creek. She was ordered onto the ground and unmercifully killed by a blow to the head without a word of protest from Lankford. Although Lankford testified that he did not intend that the Bravences die, Lankford not only participated in the murders, but he did nothing to prevent his brother from bludgeoning Mrs. Bravence after he had witnessed the savage consequences of the nightstick attack on Mr. Bravence. The attack was brutal and one that could only have been intended to kill the victims because of the severity of the blows. The district court judge was entirely justified in finding from these facts that Lankford was a major participant in the killings and that he intended that the Bravences die.

The character and nature of Lankford leads to the conclusion that he was an extremely dangerous person. The fact that the murders were committed while Lankford was in violation of parole on a robbery charge in Texas, and was fleeing from the authorities, indicated to the sentencing court that he has little respect for the law or for fellow human beings, and the record substantiates this finding.

Our review of similar recent cases demonstrates that Lankford's acts can be easily aligned with other Idaho cases in which the death penalty was imposed. In *State v.*

cases were not only brutal, but the defendants had, like Lankford, prior criminal records. In *State v. Sivak*, 105 Idaho 900, 674 P.2d 396 (1983), defendant viciously murdered his female victim who was a former co-worker. Sivak, like Lankford, had a prior criminal record. In these and other recent cases the aggravating circumstances surrounding the commission of the crime far outweighed any mitigating circumstances.

In *State v. Aragon*, 107 Idaho 358, 690 P.2d 293 (1984), we stated:

> "We acknowledge the trial court's superior ability to observe witnesses and their demeanor during the sentencing phase of a trial, and especially the unique ability of the trial judge to observe the character and demeanor of the defendant, a tool essential to the ultimate goal of tailoring a sentence to a particular defendant. With that unique ability of the trial court in mind, we have determined that the sentence imposed in the present case is not out of proportion to the sentence heretofore imposed." 107 Idaho at 369, 690 P.2d at 304.

We find that the trial court exercised this unique ability, understood the record in detail, and acted in accordance with Idaho statutory procedure to sentence the defendant to death.

The judgment of conviction and the sentence imposed are affirmed.

SHEPARD, C.J., and DONALDSON and HUNTLEY, JJ., concur.

HUNTLEY, Justice, concurring.

While concurring in the majority opinion, I do so with the reservation that I remain convinced that Idaho's death sentence procedure, in failing to utilize the jury in the process, violates the Idaho Constitution for the reasons I have stated in *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), and, *State v. Sivak*, 105 Idaho 900, 674 P.2d

death penalty only in appropriate cases can best be obtained when the decision to impose that penalty is made by a jury rather than by a single governmental official.

Judges should resist the constant temptation our offices present to arrogate power unto ourselves to the detriment of the jury system.

BISTLINE, Justice, concurring only in affirming the verdict and dissenting.

I.

The most important issue at stake here was the last dealt with in the majority opinion, Part IV(3): "Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[1] The majority, in its footnote 14, runs off its usual routine string of cases in support of its routine declaration that "we have reviewed the sentence imposed and the sentences imposed in similar cases in an effort to assume that the sentence in this case was not excessively disproportionate." Added to that string of cases for the first time, and prominently heading the list, are *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985), and *State v. Scroggins*, 110 Idaho 380, 716 P.2d 1152 (1985), *State v. Beam*, 109 Idaho 616, 710 P.2d 526 (1985), and *State v. Fetterly*, 109 Idaho 766, 710 P.2d 1202 (1985). The majority opinion, however, contains surprising little informing the reader as to what dispositions were made in the string of cases cited, and especially with regard to the two last cited, or how Lankford's death-deserving conduct measured up to the death-deserving and death-undeserving conduct in the string, other than this much:

> Our review of similar recent cases demonstrates that Lankford's acts can be easily aligned with other Idaho cases in which the death penalty was imposed. In *State v. Gibson*, 106 Idaho 54, 675 P.2d 33 (1983), and *State v. Paradis*, 106 Idaho 117, 676 P.2d 31 (1983), the nature

defendants were similar to this case. The murders in those cases were not only brutal, but the defendants had, like Lankford, prior criminal records. Majority op., p. 704, 747 P.2d, p. 726.

All that the majority does in its proportionality review is to portray the conduct of Lankford in connection with the killing of the Bravence couple from which it is concluded that: "The district court judge was entirely justified in finding from these [recited] facts that Lankford was a major participant in the killings and that he intended that the Bravences die." Majority op., at p. 704, 747 P.2d at p. 726. The majority opinion appears to be patterned after that of the Arizona Supreme court in its second review of the *Raymond Tison* case on post-conviction proceedings:

> Intent to kill includes the situation in which the defendant intended, contemplated, or anticipated that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony. *State v. Raymond Tison*, 142 Ariz. [454] at 456, 690 P.2d [755] at 757 [1984].

Felony murder is first degree murder, and it can merit life imprisonment. Felony murder is not, however, necessarily premeditated first degree murder, which can merit the death penalty. The majority opinion correctly reports that the district court ruled that there was a specific intent to cause the deaths of the victims, BUT, the majority avoids taking note that the trial court was careful not to make a finding that such intent was attributable to Bryan Lankford and instead made this finding:

> (d) The murders were defined as murder of the first degree by Idaho Code Section 18-4003(d), and the murders were accompanied with the specific intent to cause the deaths of Mr. and Mrs. Bravence. R., p. 348.

That language, beyond any doubt, may

portionate to sentences imposed in similar cases. Our independent review of this case does not reveal any indication of existence of arbitrary factors. *Our review of similar cases involving the death penalty, while necessarily limited by the lack of such cases, as noted in State v. Creech, supra, does not reveal the presence of any particular excessiveness or disproportionality in this particular case.* The heinous nature of the crime committed in this case, and the nature and character of the defendant, makes the imposition of the death penalty in this case both proportionate and just. *Sivak, supra*, 105 Idaho at 908, 674 P.2d 396 (emphasis added).

But, the majority not at that time incorporating a string citation of cases reviewed, artfully ignored *State v. Major*, 104 Idaho 4, 665 P.2d 703 (1983, a first degree *premeditated* murder conviction—a brutal stabbing—where the death sentence was not imposed. Equally ignored was a companion case to *Sivak*, namely *Bainbridge, supra*, where the death penalty was not imposed. Nor can it be said in defense of the *Sivak* majority that omission of any comparison to *Major* and *Bainbridge* was inadvertent. My own opinion rather forcibly brought those other cases to the fore:

> It is difficult, if not impossible, to reconcile the two sentences. One murderer dies; the other lives. This is a classic case of the disparity in sentencing which produced *Furman* and in turn led to the second series of cases four years later wherein the Supreme Court declared that *Furman* had been misunderstood, while Idaho in the interim destroyed death penalty sentencing procedures which would today be entirely valid according to my own reading of the "threshold theory" which the Supreme Court now retreats to in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). I am not critical of Justice Stevens' opinion—which was expected. At the same time I agree with the view of Justice Marshall stated and written even prior to receiving *Zant*, Idaho's procedure in capital sentencing did not lead to arbitrary and capricious imposition of death sentences. Well instructed juries would hear evidence offered in mitigation and in aggravation, and would decide between life or death. Bifurcation of the guilt phase from the penalty phase would serve to avoid undue prejudice to a defendant charged with first degree murder. *Sivak, supra*, 105 Idaho at 914, 674 P.2d 396.

In that opinion, writing primarily for the education of the majority who did not seem to be aware of *Bainbridge*, the involvement of both Sivak and Bainbridge, highly similar to the joint involvement of Fetterly and Windsor, and also to the joint involvement of Scroggins and Beam, it was pointed out that:

> Two men, Sivak and Bainbridge, were found guilty of first degree murder which was committed in the course of a planned robbery of a gas station attendant who was acquainted with both and who could have identified both individuals. The attendant, a woman but a few years older than the defendants, was stabbed twenty times and shot three times—a brutal murder if ever there was one. The two were jointly charged, as they should have been, given a preliminary hearing, and held to answer. A single information was filed charging them jointly with armed robbery, premeditated murder, and murder in committing a felony of robbery, as they should have been charged. Neither made a motion for separate trial, apparently being unable to show the prejudice required by our case law, and they should have been tried together. But they were not so tried. One defendant, Bainbridge, filed an affidavit of disqualification against Judge Newhouse, who thereupon disqualified himself as to Bainbridge only, for which there may or

> defendants were not tried together as they should have been for the crimes the two of them committed, but the results of the guilt trials came out the same, as both were convicted of first degree murder. There is little doubt in my mind, after reviewing the facts and circumstances of the crimes, that had they been tried jointly and had the jury been the sentencer both would have suffered the same fate. But they were not tried together for their jointly committed crimes as they should have been, and a jury was not the sentencer as should have been the case. As it stands now, one dies and one lives. If this is not disparate sentencing, then I do not expect to ever see it.
>
> The two co-defendants were not only bungling criminals and inept, and thus brutal murderers, but also not loyal to each other. Sivak, who testified at his trial, claimed that Bainbridge did all of the robbing and murdering while he, Sivak, was merely in the company of Bainbridge at a poor time. Bainbridge, who did not testify at his trial, gave taped statements to the investigating officers which, on his turn to talk, blamed the entire criminal activity on Sivak, Bainbridge by misadventure merely happening to be with him at the wrong time and place, as it turned out. There were no other witnesses to the crime of murder than these two defendants. The two different juries convicted both of first degree murder and robbery, Sivak testifying to his innocence, Bainbridge not taking the stand. Neither testified at the other's trial. Notwithstanding like jury verdicts the district judges involved imposed the drastically different sentences for the same crime of murder. As acknowledged in the majority opinion in Part II B, Judge Newhouse in Sivak's case made a § 19-2515 finding that "[t]he defendant dominates his co-defendant and is primarily responsible for all that occurred." The majority, notwithstanding Judge Rowett in Bainbridge's case that "[a]lthough he had the opportunity and the encouragement of the co-defendant to do so, defendant did not himself inflict any death threatening wounds on the victim," and "that defendant did not himself deliver any death threatening blows to the victim...." *Id.* at 915-16, 674 P.2d 396.

Following which, on the issue of required proportionality, I added my assessment in regard to *Sivak* and *Bainbridge* which, I am gratified to be able to say now, is much the same as Judge Lodge's post-mortem review of *Windsor* and *Fetterly* following this Court's setting aside of the death penalty imposed on Windsor:

> Now, a large difficulty with these two cases and the disparity in penalties imposed, is an inability to see how it would make any genuine difference which of the two defendants delivered the more telling blows, knife wounds, or shots against and into their helpless victim. The cold inescapable fact is that *they* murdered her, and that the two district judges, neither of whom ever heard Bainbridge testify as to the circumstances of the crime, and only one who heard Sivak testify, could both to a degree exonerate Bainbridge at Sivak's fatal expense is regrettably to my mind unacceptable. Moreover, it highlights the bizarre results of having two separate trials where there should have been a single trial, and drives home the importance of adhering to jury death sentencing as is a defendant's right under the Idaho Constitution. *Id.* at 916, 674 P.2d 396.

Judge Lodge, where proportionality is involved, performed a great service for the State of Idaho in speaking out against this Court's disparate sentencing in *Windsor* viz-a-viz *Fetterly*, and in *Scroggins* viz-a-viz *Beam*. Had he also written of *Sivak* and *Bainbridge*, an even greater service would have occurred. It is, in my view, of extreme importance that this Court, and

equivalent to that imposed on their co-defendants, whose death sentences have been affirmed on appeal. Despite a record which strongly indicate that in their respective cases both Scroggins and Windsor were *the* motivating forces behind the commission of the crimes and were in fact the catalysts which set the crimes in motion, a situation has resulted which suggests that 'where the death of another is attempted by two people ..., he or she who was less successful must yield the hangman's noose to the one to whom must go the honor of inflicting the blow or wound which gains the medical credit for producing the victim's expiration.' 85 I.S.C.R. at 2566 (Justice Bistline's separate opinion). *In both cases it is clear that Windsor and Scroggins knew that the victim was to be killed and were actively and inextricably entwined in the victim's fate.* With the possible exception of the Creech cases, where there have been multiple deaths, this court is not aware of any murder case in this state where the death penalty has been upheld which would offend the average person more than the facts presented in *Windsor* and *Scroggins*.

"In the *Windsor* opinion the Supreme Court maintained that Windsor's level of participation in the crime was sufficiently different from that of her co-defendant Fetterly so as to justify the disparity in their sentences. Additionally, certain other factors were cited: her lack of formal criminal record; the lack of significant prior criminal activity; the lack of evidence regarding any history of violent behavior or propensity toward violence; her cooperation with authorities both after arrest and during incarceration; her troubled childhood; and her strong rehabilitative potential. *This review glossed over the facts of Windsor's actual involvement* in bringing about Sterling Grammer's death and instead emphasized the mitigating factors which were thoroughly considered by this court and found not to outweigh the aggravating factors.

Mondi Lenten, compared to that of co-defendant Beam, as well as his unstable upbringing, mental and chronological age, level of cooperation, and lack of history of violent criminal conduct. However, the record in this case supports the conclusion that any disparity between Scroggins' and Beam's participation is a distinction with little difference. It is true that the Scroggins jury did not find him guilty beyond a reasonable doubt of slitting his victim's throat, but neither did the jury so find in Beam's case; yet it most certainly happened, and both defendants are legally responsible. Additionally, while Scroggins was convicted of the included offense of Attempted Rape and Beam was convicted of Rape as charged, the *Scroggins* verdict must be viewed in light of the evidence. It is inconceivable to this court that Scroggins should be given any consideration in the sentencing process for the disparity in the verdicts when the only reasonable explanation for Scroggins' not accomplishing the rape, in light of all the other evidence, was that his victim, in a final and desperate measure, forced a bowel movement in the hope that the excrement would turn Scroggins away, and when the evidence indicates that he still forced her to commit an act of fellatio on him. Also, the fact that Scroggins reported the crime has to be viewed in context in order to see it for what it was. First, Scroggins when home and went to sleep with no pangs of conscience after having been involved in a brutal slaying. The next day, under parental influence, and with co-defendant Beam on the run and a handy 'fall guy,' Scroggins went to the police. No one involved in this case—police, investigators, the jury, or this court—has ever found or believed that Scroggins told the truth about what happened to Mondi Lenten, except to the extent that he did lead the police to the crime scene, which he of course had to do in his attempt to place the blame on Beam, his supposed friend. Additionally, while the Supreme Court's

> death sentence, a recent check with the warden of the Idaho State Penitentiary demonstrated that this court's assessment was borne out upon Scroggins' release from death row, whereupon his conduct caused him to be first placed in the 'hole,' and then in close or protective custody. Finally, this court carefully considered the mitigating factors identified by the Supreme Court in its opinion prior to determining at the time of sentencing that the mitigating factors did not outweigh Scroggins' culpability for the crime and the nature of his character.
>
> *"The crimes committed by both Scroggins and Windsor were accomplished under such circumstances that reasonable minds could not differ about the fact that there was in each case a knowing and final betrayal by the defendant of any respect for human life.* Even after a careful consideration of the mitigating factors in their respective cases, it was and still is the conclusion of this court that these mitigating facts do not outweigh the aggravating factors. While a defendant may demonstrate a change of heart once he or she is cornered, may become cooperative, may display some rehabilitative potential, and may work within the system to emphasize his or her good points and to obscure the bad ones, these factors in and of themselves must not automatically overshadow a defendant's culpability for the crime which has been committed and for the life which he or she has previously led, if there is to be any validity to the sentencing objective of protecting society in addition to serving the interests of a defendant. Further, where a court must give a disproportionate amount of weight to matters which occur after the commission of a crime, *there never will be proportionality in sentencing between the advantaged and the disadvantaged.*"
>
> Order of Disqualification, *State v. Windsor* and *State v. Scroggins*, pp. 3-10 (emphasis added).

The majority makes much of Windsor's childhood and her background in general. All of these factors were first considered by the trial judge. The fact remains that, just as the judge observed, two people, Windsor and Fetterly, set out together on this crime spree which culminated in the death of their selected victim. This is not an *Enmund* situation—not even a distant cousin of *Enmund*.

and, at page 432, 716 P.2d 1182;

> Here we have no driver of a get-away car—completely detached from the scene of a murder-in-progress. Hence, I see no necessity for the majority's considerable exertion in reaching the conclusion that "there is no merit to Windsor's contention that the imposition of the death penalty was constitutionally impermissible under the mandate of *Enmund*.

The majority, in its *Windsor* opinion, nevertheless found justification for allowing her to escape the death penalty which had also been meted out to Fetterly, and *affirmed*, in the disparate sentences imposed on Bainbridge, *State v. Bainbridge*, 108 Idaho 273, 698 P.2d 335 (1984), and Sivak, *State v. Sivak*, 105 Idaho 990, 674 P.2d 396 (1983), and likewise the sentences imposed on McKinney, *State v. McKinney*, 107 Idaho 180, 687 P.2d 570 (1984), and Small, *State v. Small*, 107 Idaho 504, 690 P.2d 1336 (1984):

> In both sets of cases, the defendant who did the actual killing was given the death penalty while his co-defendant received a life sentence. The difference in their degree of participation in the crime appeared to be the primary factor justifying the disparity in sentences in both sets of cases. *Windsor, supra*, 110 Idaho at 421, 716 P.2d 1182.

The majority in *Sivak* upheld the imposition of the death penalty, and had the effrontery to observe that:

> I.C. § 19-2827 requires us to conduct a review of the record to determine if this particular death sentence resulted from

Q. And how was it that one particular story got prepared in writing?

A. Well, the first story Mr. Bryan Lankford told was that he and his brother Mark had gone from the Houston area to Canada where Mark's car had been stolen. That they'd gone to Canada in Mark's car and it had been stolen. That didn't wash, I didn't believe it. I pointed out that Bryan's fingerprints had been found in the Bravence van, and he had to have been in it at one time or another, and he said: Okay. The second story was that: yeah, we up there, we were camping in Idaho. We didn't want to use Mark Lankford, my brother's car anymore, so I stayed in the camp, Mark left for a few hours, came back with a green van and we went on.

And I told him that wouldn't wash because his handwriting and fingerprints had been found on credit card receipts and so forth from the use of the Bravence credit card. The second time he said: Okay. I'll tell you the truth, the whole story. And that's when we started the signed that statement.

Q. And how did you go about preparing such signed statement?

A. I set out and lettered out in narrative form. I'd say: Well, what happened next.... and I'd write a sentence, and then say: What happened next.... and I just set and wrote it out. And at the end he read it and accepted my words, if you will, and signed it and wrote a little paragraph at the end of it.

Q. This document is in your longhand?

A. Yes, sir.

Q. And it bears some of his longhand?

A. Yes, sir.

Q. Did he have an opportunity to look at each page?

A. Yes, sir. He read and initialed [illegible] and signed the last page.

Q. Calling to your attention what's been marked for identification as State's Exhibit No. 76, what is that?

A. This is the signed statement we prepared on October the 7th, 1983, at Liberty County, the one that Bryan Stuart Lankford furnished to me.

Q. How many pages is it?

A. Six pages.

Q. Do you recognize each of the six pages?

A. Yes, sir. My handwriting is on each of the six pages.

Q. You indicated there were initials of Bryan Lankford on the pages, where do those appear?

A. Yes, sir. They appear at the top left where each page was started, at the bottom right where each page was ended.

Q. On the last page does there appear any handwriting of Bryan Lankford?

A. Yes, sir. On the last page Bryan's initials appear at the top left. He signs it at three quarters of the way down the page; and, then, I signed it as Larry Allen did as witnesses to the statement.

Q. Is there a discernible change in the handwriting?

A. Yes.

MR. ALBERS: Move the admission of Exhibit No. 76.

MR. LONGETEIG: No objection.

THE COURT: 76 will be marked into evidence.

(Thereupon State's Exhibit No. 76 was marked into evidence by the deputy court clerk.)

BY MR. ALBERS:

Q. Mr. Ploeger, since this is in your handwriting, could you read that for us?

A. Yes, sir: Liberty, Texas, October the 2d, 1983, I Bryan Stuart Lankford make the following free and voluntary statement to Federal Bureau of Investigation Special Agent Dennis L. Ploeger.

vice of Rights that I read, understood, and signed.

I finished the eleventh grade in school, got a GED certificate, and can read and write the English language.

Sometime in early June, 1983 Mark Lankford, my brother, came to Conroe, Texas where I was staying with my uncle, Kenneth Lankford, at 117 Lidian (phonetic) Street. I was planning to leave the area, and I called Mark to tell him I was leaving. Mark said he was going to leave the area also, so he came to Conroe from Houston, Texas, where I called him, and we left Conroe together.

We traveled in Mark's brown Chevrolet Camaro Z28, and Mark did all the driving. I had money for gas. We went through Oklahoma, Kansas, Wyoming, and possibly one or two other states before arriving in Idaho. Mark and I camped between Golden and Elk City, Idaho when we got to Idaho. We were at the camp that is off a dirt road on the side of a mountain in the woods. It was high on the mountain, and it snowed every day. After about two weeks Mark and I decided to leave the area. We had hidden Mark's car under brush near our campsite earlier. Mark wanted to leave the car because it had Texas license plates and he was afraid that he would be stopped, and he had not been making payments on the car.

We left all our personal belongings in the car except for a small bag of clothes and a twelve gauge longtom shotgun, that I carried. We left the camp and were walking down the dirt road from the camp when a white man in tan Jeep picked us up and took us to the main road. We walked towards Golden, Idaho until we came to a campsite where a green VW van was parked. Mark said there was a easier way to travel than walking, and after about an hour of discussion, we decided to steal the VW van for transportation.

Mark and I walked into the camp ground. The man did not get on the ground, but said take the money and the van and something like don't hurt us. Mark then hit the man over the head with a night stick, like a policeman uses. He had the night stick for a long time, and carried it in his car. The woman came up from a nearby creek about that time, and Mark told her to get on the ground. She said something about her husband being hurt on the ground; and, then, she got on the ground. Mark then hit the woman over the head with the same night stick that he had hit the man on the head with. I don't remember if Mark hit the man or woman once or more than once.

He then—we then put the camping gear of the man and woman into the VW van. The man and woman had a dog, but we left the dog at the campsite. We then put the man and woman on the floor in the back of the VW van. It took both Mark and I to put them into the van. I then drove the VW van back to where Mark and I had been camped. Mark got out and took the man and woman out the side sliding door of the van and drug them off into the woods. I stayed in the van. Mark wanted to take the man and woman back to our old campsite. I am not certain, but we may have picked up some of our belongings. I don't remember any discussion about hiding the man and woman. I didn't know if the man and woman were dead when we took them to our old campsite. After that it was the middle or latter part of June, 1983 when Mark and I got the van and Mark hit them with the night stick, we went to Oregon; and, then, California in the van that belonged to the man and woman.

We used a Master Charge credit card in the name Robert Bravence, that we got from the glove box of the van, to buy gas, clothing, and at restaurants. I signed the receipts when we used the

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this Court's reversal of a death sentence imposed by him, *see State v. Osborne*, 104 Idaho 809, 823, 663 P.2d 1111, 1125 (1983) (Bistline, J., concurring and dissenting), only Judge Lodge has let his views be known, and then only when his conscience so motivated him. It is to be remembered that only in recent years have the state's district judges had thrust upon them that "awesome responsibility." In speaking out against this Court's reversal of the death sentence in *Windsor*, Judge Lodge noted that, in evaluating the wisdom of appellate court sentencing, "a trial judge is more like a jury than he is like an appellate court. Like a jury, he has seen the witnesses and is well positioned to make those delineations of demeanor and credibility that are peculiarly within a trial judge's province." He was quoting from *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). Because a jury is more like a jury than is a trial judge like a jury, and speaking as one member of this Court, I express the view that everyone involved in capital sentencing, at whatever level, would greatly benefit if the views of Judge Lodge were made available, together with those of all the state's district judges, on the appropriate comments of United States Supreme Court Justice John Paul Stevens, also writing in *Spaziano*, and joined by two other justices. His beliefs are more readily available in *State v. Stuart*, 110 Idaho 163, 179–81, 715 P.2d 833, 849–51 (1985) (Bistline, J., dissenting). In sum, Justice Stevens stated it thus:

"In the 12 years since *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense. Because it rage—its sense that an individual has lost his moral entitlement to live—I am convinced that *the danger of an excessive response can only be avoided if the decision to impose the death penalty is made by a jury rather than by a single governmental official.* This conviction is consistent with the judgement of history and the current consensus of opinion that juries are better equipped than judges to make capital sentencing decisions. *The basic explanation for that consensus lies in the fact that the question whether a sentence of death is excessive in the particular circumstances of any case is one that must be answered by the decision maker that is best able to 'express the conscience of the community on the ultimate question of life or death.' Witherspoon v. Illinois*, 391 U.S. 510, 519, 88 S.Ct. 1770, 1775, 20 L.Ed.2d 776 (1968) (footnote omitted).

....

"Thus, the legitimacy of capital punishment in light of the Eighth Amendment's mandate concerning the proportionality of punishment critically depends upon whether its imposition in a particular case is consistent with the community's sense of values. Juries have historically been, and continue to be, a much better indicator as to whether the death penalty is a disproportionate punishment for a given offense in light of community values than is a single judge. If the prosecutor cannot convince a jury that the defendant deserves to die, there is an unjustifiable risk that the imposition of that punishment will not reflect the community's sense of the defendant's 'moral guilt.'" *Spaziano, supra*, 104 S.Ct. at 3167–78 (footnotes omitted). *State v. Stuart*, 110 Idaho 163, 179–81, 715 P.2d 833, 849–51 (1985) (emphasis added).

That which is also missing from the majority opinion is any discussion comparing Bryan Lankford's conduct with that of his

considered as it was by the majority in *Windsor, i.e.*, her culpability as compared to Fetterly's, or should it be as it is today, comparing the murder of the Bravences in relation to the murders perpetrated by Paradis and Gibson? On this sad state of affairs, I continue to find appropriate my final remarks in the *Stuart* case:

As I wrote in *Sivak* or *Bainbridge*, the proportionality requirement prescribed by the Supreme Court and in turn adopted by the Idaho legislature is virtually meaningless. Proportionality in capital sentencing in Idaho will only result *when first degree murder charges are all tried to a jury*, and the jury also as the conscience of the community makes the awesome decision of life or death where a first degree murder verdict is returned.

How there can ever be any real proportionality continues to escape me where prosecutors exercise a divine right to reduce the charge and to ask or not ask for the death penalty, as may at the moment so move them. Recently, the citizens of Ada County were given to understand that the prosecutor had decided that on a guilty plea to the execution-style murder of a girl in her twenties, *he* would not ask for the death penalty. Other defendants so accused do not fare so well. Such matters are not for mortal prosecutors, but for mortal jurors. *Id.* at 202, 715 P.2d 833 (emphasis original).

With Windsor, Scroggins, Bainbridge, and Osborn having escaped the death penalty by reason of the (erroneous) grace of this Supreme Court, how is it that in the name and pursuit of proportionality, the remittiturs are not recalled and proportionality meted out as it should be. Precedent is not lacking. *State v. Ramirez*, 34 Idaho 623, 203 P. 279 (1921), which was discussed most recently in *State v. Stuart*, 110 Idaho at 228–29, 715 P.2d 833 (Bistline, J., dissenting on rehearing).

II.

ment in passing. Putting aside the loose use of "confessions," "admission" and "statements" as though the same are interchangeable, it would seem to me that if the majority has found in this voluminous appeal record any confession by Bryan Lankford to his killing of either of the Bravences, it would be put on display without the least hesitation, just as the majority did, and accurately set out a synopsis of his testimony at trial. Where the majority asserts that there are such confessions, admissions, and statements without any elaboration or explanation as to content, it can only be assumed that it is a ployful play on words. The robbery was undoubtedly what led to the killings, hence, if Bryan Lankford conceded his complicity in the robbery, which he did by his own testimony, the majority is able to leave the reader believing that his statements, admissions, and confessions were that he participated in the killing. Seeing no reason for such shenanigans in writing a decision in a death penalty case, with some trouble I have located the oral recitation of the "written confession to an FBI agent." Working in Texas, he became aware that the Bravences were missing, and last seen in Idaho, and ultimately got involved with Bryan and Mark Lankford at the sheriff's office in Liberty County, Texas, where the two Lankfords were jailed. He testified only as to his interview with Bryan and a *statement* signed by him, and the discussion which led up to it. The statement was marked as Exhibit 76, admitted into evidence by the court, there being no objection, but Exhibit 76 does not seem to be amongst the exhibits. Mr. Ploeger, the agent, read it in giving his testimony after first detailing how it was procured:

BY MR. ALBERS:

Q. Let's try again. How did the interview progress? What happened within the interview?

A. Okay. I interviewed him told him

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rereading what I had to say in some of the other death penalty cases, it is seen that both Judge Lodge and myself are vindicated in our views on capital sentencing, and particularly culpability and intent.

I cannot believe that Beam absent Scroggins would have murdered their helpless victim. Nor can I believe that Fetterly absent Windsor would have murdered their helpless victim. Nor can I believe that Sivak absent Bainbridge would have murdered their helpless victim. Two people conspiring to commit a crime are essentially of the same temperament as a small lynch mob—doing in concert what one would not attempt alone.

In sum, I continue to agree with Justice Huntley that under the *Idaho* Constitution capital sentencing by a jury is required—a proposition weakly challenged by Justice Bakes and avoided by every other jurist in Idaho, and yet to be addressed by the solicitor general, who obviously *favors* judge sentencing—having authored the death penalty sentencing provisions adopted by the Idaho Legislature in the aftermath of *Furman* and *Woodson*. I entertain no doubt that Bryon Lankford is properly found guilty of felony murder, and that the verdict and judgment should be affirmed. Because the two Lankfords share an equal complicity in the planned robbery which culminated in two senseless murders—where there was obviously more regard for a dog than there was for human life, had the jury been given defendant's requested Instruction No. 4, or something similarly worded, and had the jury answered in the affirmative, my vote would unhesitatingly be to uphold the imposition of the death penalty. Had the jury been the sentencing authority as it is in 95% of the 50 states, my vote would be to affirm the death sentence, even though there may be here a lower "degree of participation in the crime" (*see* the rule of *Windsor, supra*, at 708–709, 747 P.2d at 730–731) on the part of Bryon Lankford than there was on the part I would be more amenable to a majority opinion which did not leave standing in place the ratio decedendi by which the majority left Fetterly to be executed, while sparing Windsor, and left Beam to be executed while sparing the far more culpable Scroggins. Had the trial judge recited firm evidence from which he was able to say not just that "the murders were accompanied with the specific intent to cause the deaths of Mr. and Mrs. Bravence," but that Bryan Lankford himself was possessed of that specific intent, and were not the *Tison* case seemingly standing in the way, I could vote to affirm the death penalty, reserving only the proposition that the Idaho Constitution requires that the sentencing function be performed by a jury.

An unfortunate aspect of this case, as in the murders by Sivak and Bainbridge, and as in the murder by Scroggins and Beam, is the separate trials of the two defendants. They were jointly charged, had a joint preliminary hearing, and as I remember it, were named as co-defendants in the initial information filed in district court. The record does not contain an order of severance or a motion for severance, and there appears to be no involvement of any confessions to murder which would require application of the *Bruton* rule. It would seem to me that here, as in the Sivak-Bainbridge murder, and in the Scroggins-Beam murder, and likewise the Fetterly-Windsor murder, where there were no eye-witnesses other than the defendants, a single jury would not only have been better suited to decipher the truth, but to make the assessment of the "degree of participation in the crime," and impose the penalty—which would likely be highly proportionate.

the traveler's checks that we got from the glove box of the van that were in the name Robert Bravence. Some of the traveler's checks had a woman's name, so we threw them away. I don't remember if I threw them away or if Mark did, but we probably threw them away somewhere in San Francisco, California because it was the first big city we went into. I don't remember the name of any specific gas station, clothing store, or restaurant where we used the credit card or the traveler's check. But we purchased food, clothing, and gas with these items.

When we got to Los Angeles, California I called Roy Ralmuto in San Antonio, Texas, and told him that Mark and I wanted to come stay with him. He sent us two bus tickets, and we went to San Antonio the last of June or early July, 1983. While I was waiting for the bus tickets Mark took the VW van, and later said he left it on the street with the keys in the can.

I have not talked to anybody about the above activity with the man and woman. I never called the Sheriff or anybody in Idaho to tell them where the man and woman were or that they may need help.

I don't remember what Mark did with the night stick after he hit the man and woman. He may have left it at the campsite of the man and woman. He may have taken it back to where we had camped earlier. Or he may have thrown it out somewhere between the two camps. I believe we left the long tom shotgun I had at the camp of the man and woman in the VW van when it was abandoned in Los Angeles, California. We probably threw the credit card away.

And in Bryan Lankford's handwriting: I have furnished this six page statement free and voluntary. No force, threats, or promises were used to influence me to make the statement. I signed below and have initialed the other five pages.

MR. ALBERS: No further questions. Tr., Vol. 3, pp. 524–32.

The "confession" as I read it is not as inculpatory as to Bryan Lankford's involvement in the robbery as his trial testimony. As to murders, it is only inculpatory as to the carrying of the shotgun by Bryan Lankford, and portrays Mark Lankford as killing Captain Bravence while he was on his feet pleading to be robbed only, and in turn killing Mrs. Bravence when she knelt to tend to her stricken husband. I do not agree with that statement being characterized as a written confession regarding the killings. A confession is generally defined as a statement acknowledging guilt of the offense charged. *See* Black's Law Dictionary, Fifth Ed., p. 269, where is also explained the distinction between a statement and a confession.

III.

A major concern is caused by the majority's handling of the court's failure to give defendant's Requested Instruction No. 4, set out in the opinion at p. 694, n. 4, 747 P.2d at p. 716, n. 4, and for facility of reading repeated here:

DEFENDANT'S REQUESTED INSTRUCTION NO. 4

. . . .

Answer this question only if you find the defendant, Bryan Lankford, guilty of Murder in the first degree.

Do you find, beyond a reasonable doubt that Bryan Lankford himself killed, attempted to kill, or had any intent to kill either of the victims in this case?

The majority turns aside the challenge on the premise, unspoken, that it is irrelevant. Says the majority, "In Idaho it is the judge and not the jury who makes the determination of whether the death sentence will be imposed." What the majority necessarily must concede, however, is that this is a close case. The district court did *not* make

ford's conduct, having by the time of Bryan Lankford's sentencing presided over both trials,[1] was this:

(d) The murders were defined as murder of the first degree by Idaho Code Section 18-4003(d), and the murders were accompanied with the specific intent to cause the deaths of Mr. and Mrs. Bravence. R., p. 348.

That is not by any stretch of the imagination the equivalent of a district court finding which, if the court found from the evidence, could have been couched in this suggested language: Bryan Lankford, although he himself was not the slayer of either of the victims, had the intent that the victims would be killed. Nor is it a finding that Bryan Lankford himself killed either of the victims, or attempted to kill them.

It would seem that there was no valid reason for the trial court's refusal to give the requested instruction. At the least, the consensus of the jury, who had heard the same evidence, would be, and should be, of great moral support when the court arrived at the moment of awesome responsibility when had to be made the decision between life and death. Moreover, the defendant was placing all the marbles on the line in asking for that instruction. If the defendant was willing that the consensus of the jury might have been a *yes* answer, the court would have been spared some, if not much, of the agonizing of which District Judge Oliver lamented in *State v. Osborn, supra*, when he refused to conduct a second sentencing hearing, but instead imposed a life sentence without complying with this Court's mandate on reversal and remand.

There is no rule or principle which, even under the solicitor general's scheme for capital sentencing adopted by the legislature, nothing which forbids a district judge from getting advisory verdicts from a jury—much the same as is commonly and properly done in equity cases. And, notwithother times, pre-*Furman* and pre-confusion, when the court instructed the jurors on the law and to the jury fell the awesome responsibility of imposing either a death or life sentence. District judges are sworn to uphold the Idaho Constitution, and while not free to disregard a majority opinion from this Court, are free to have and express their own views. If ever before *Furman* and *Woodson* there was any public or district judge clamor in Idaho to do away with jury sentencing in capital cases, it escaped the attention of anyone I know, and my own as well.

CONCLUSION

The extent of Bryan Lankford's participation in the actual killing will probably never be known. What is known is that he was a participant in the robbery and carried a shotgun. It can be said, too, that he watched the killings, after which he aided his brother Mark Lankford in removing the bodies. It cannot be said on this record that he is bound by the state of mind of his brother. The Supreme Court of the United States in *Tison* set the proper guideline for the sentencing of Bryan Lankford.

> A critical facet of the individualized determination of culpability is the mental state with which the defendant commits the crime. . . . A narrow focus on the question of whether or not a given defendant "intended to kill," however, is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers. . . . Similarly, we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

As I read again that which Judge Lodge

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APPENDIX B

1989 Opinion No. 46

IN THE SUPREME COURT OF THE STATE OF IDAHO
Nos. 15760-16170

STATE OF IDAHO,	)	
	)	
Plaintiff-respondent,	)	Moscow term, October 1988
	)	
v.	)	Filed: April 4, 1989
	)	
BRYAN STUART LANKFORD,	)	Frederick C. Lyon, Clerk
	)	
Defendant-appellant.	)	

On remand from the Supreme Court of the United States.

The Supreme Court of the United States, having vacated our prior decision in this matter which affirmed appellant's conviction and death sentence, remanded the case for further consideration. Affirmed.

Joan M. Fisher, Genessee, Idaho, for appellant.

Hon. Jim Jones, Attorney General; Lynn E. Thomas, Solicitor General, Boise, Idaho, for respondent. Mr. Thomas argued.

BAKES, J.

This matter is before us on remand from the Supreme Court of the United States. That Court vacated our decision affirming Bryan Lankford's conviction and death sentence, *State v. Lankford*, 113 Idaho 688, 747 P.2d 710 (1987), and remanded for further consideration in light of its recent decision in *Satterwhite v. Texas*, 486 U.S. ___, 108 S.Ct. 1792 (1988). *Lankford v. Idaho*, 486 U.S. ___, 108 S.Ct. 2815 (1988). After further consideration we again affirm the judgment of conviction and sentence imposed.

I

Our decision on remand requires us to analyze the United States Supreme Court opinion in *Satterwhite*. The Court began its opinion with the following:

> "In *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), we recognized that defendants formally charged with capital crimes have a Sixth Amendment right to consult with counsel before submitting to psychiatric examinations designed to determine their future dangerousness." 108 S.Ct. at 1794-1795.

The Court in *Satterwhite* further stated:

> "We granted certiorari to decide whether harmless error analysis applies to violations of the Sixth Amendment right set out in *Estelle v. Smith*." 108 S.Ct. at 1796.

The Court in *Satterwhite* held that the harmless error analysis does apply.

In this case Lankford did not raise the issue of a sixth amendment violation either at trial or on appeal. Accordingly, this issue is waived. *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639 (1986); *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497 (1977).[1]

---

[1]We also note that there is no evidence of any sixth amendment violation in this case. During Lankford's trial he was represented by counsel and voluntarily chose to testify in his own defense. His testimony on direct and cross examination was extensive, describing not only his latest version of the killing of the Bravences, but also describing how he and his co-defendant brother, Mark, left Texas and came to Idaho. Lankford related details of the killings, placing blame primarily on Mark, and also related their theft and use of the Bravences' van and credit cards, which the two brothers used to make their way back to Texas.

After Lankford's conviction, but before sentencing, his counsel approached the prosecutor offering his client's testimony in Mark's

(continued...)

II

Lankford also argues that his fifth amendment privilege against self incrimination was violated when the trial court referred in sentencing to Lankford's testimony at the hearing for Mark's new trial motion. In its "FINDINGS OF THE COURT IN CONSIDERING DEATH PENALTY UNDER SECTION 19-2515, IDAHO CODE," the trial court considered the objective of "rehabilitation" and noted:

> "The defendant has shown no remorse for his offenses. He has not cooperated with authorities after his arrest. He has told authorities that he and his brother had nothing whatsoever to do with the death of the Bravences. He has testified that his brother was alone involved in the murders. He has testified (On October 10, 1984, in the companion case, State v. Mark Lankford, Idaho County Case No. 20158) that he called the Lewiston Tribune and claimed that it was he alone who murdered the Bravences[.] [T]his he later denied and offered the explanation which is set forth in the addendum to the presentence investigation report under date of October 3, 1984, to the effect that it was simply part of a plan that would secure freedom for his brother who could in turn free him.
>
> "Suffice it to say that defendant has failed to take any responsibility whatsoever for his actions. This court specifically finds that the defendant has no capacity for rehabilitation."

---

[1](...continued)
upcoming trial, in exchange for immunity from future prosecutions for the charges of robbery and fraudulent use of the credit cards. An immunity agreement was approved and executed by Lankford and his counsel in open court. At every step of his brother's trial Bryan Lankford was represented by counsel. Later, Lankford was subpoenaed as a witness at a hearing on Mark's motion for new trial and was represented by counsel at every step of that proceeding.

Accordingly, there is no evidence in the record that Lankford's sixth amendment right to counsel was violated, unlike the situation in *Satterwhite*.

Assuming that *Satterwhite* applies equally where a fifth amendment violation is shown, as distinguished from a sixth amendment violation, we now analyze the fifth amendment issue since it was adequately raised on direct appeal and therefore was not waived.

As we stated in our original opinion, footnote 7, there is no factual predicate for a fifth amendment violation. Footnote 7 states:

> "7. Lankford asserts that the district court judge used the immunized testimony in its findings of fact to support the imposition of the death penalty. However, the record does not support that assertion. While the district court described Lankford's testimony at his brother's motion for new trial in its sentencing memorandum, it was not considered as an aspect of any of the statutory aggravating circumstances found by the court. During the district court's oral discussion of the sentence, the judge stated:
>
> > 'The defendant has shown no remorse for his offenses. He has not cooperated with authorities after his arrest. He has told authorities that he and his brother had nothing whatsoever to do with the death of the Bravences. He has testified that his brother was alone involved in the murders. He has testified on October 10, 1984 in the companion case, State v. Mark Lankford, Idaho County Case No. 20158, that he called the Lewiston Tribune and claimed that it was he alone who murdered the Bravences. This he later denied and offered the explanation which is set forth in the addendum to the presentence investigation report under date of October 3, 1984, to the effect that it was simply part of a plan that would secure freedom for his brother, who could in turn free him.'
>
> "Although it is true that the district court judge pointed out the conflicting testimony given by Lankford at various times, including the testimony given pursuant to the immunity agreement, there has been no showing that the sentence was based upon the comments quoted above."

After further review of the "FINDINGS OF THE COURT IN CONSIDERING DEATH PENALTY UNDER SECTION 19-2515, IDAHO CODE," we

continue to adhere to the view expressed in footnote 7 of our original opinion. Accordingly, we find no factual predicate for Lankford's claim.

III

Even if we assume that the trial court considered Bryan's testimony at Mark's motion for new trial in arriving at Bryan's sentence, this consideration does not constitute a violation of the fifth amendment. Lankford's testimony at his brother's hearing for new trial related a version of facts given twice previously, once voluntarily at his own trial and again at Mark's trial pursuant to the immunity agreement. That testimony, as the trial court noted, was that "his brother was alone involved in the murders." This differed from Lankford's original version, that neither were involved. The whole basis of Mark's motion for new trial was that Bryan Lankford telephoned a local newspaper, the Lewiston Tribune, recanted his previous testimony and asserted, as the trial court noted, "that it was he [Bryan] alone who murdered the Bravences." By the time the motion was heard, Bryan Lankford had recanted the version he gave to the Lewiston Tribune, and reasserted the version he gave at his own trial and at his brother's trial.

The trial court's only reference at sentencing to Bryan Lankford's testimony given at the hearing on Mark's motion for a new trial, was to note the recurrent changes in Bryan Lankford's story. The trial court did not believe the substance of Bryan's Tribune story - that he alone committed murder. In denying Mark's motion for new trial, the trial court stated:

> "I'm satisfied that the new evidence that does consist of the statement by Bryan Lankford to the effect that he was totally responsible for the death or deaths of the Bravences was false. That particular statement was merely a product of depression, an effort, perhaps to get attention, certainly an effort to get out of trouble or to avoid punishment for what he did, and it is a very real possibility that two involved in a crime such as this, after they are both convicted of first degree murder, could tell then, different stories

> to help one get a new trial and, then, the other one could help the other get a new trial and certainly eventually hope for the acquittal of both or the acquittal of one."

The only consideration given to Lankford's testimony at Mark's new trial proceeding was that it again supported the trial court's observation that Lankford had not taken responsibility for his actions as evidenced by his repeated attempts to upset the course of justice by constantly changing his story, which damaged his credibility in the eyes of the court.

When Bryan Lankford, while represented by counsel, voluntarily took the stand in his own defense, testified at length concerning the entire transaction, and was cross examined, he effectively waived any immunity he had under the fifth amendment with respect to the subject matter of the testimony he gave. *Harrison v. United States*, 392 U.S. 219, 88 S.Ct. 2008 (1968). Having thus waived any privilege against self incrimination, the trial court could consider at sentencing the fact that Lankford was continually giving false testimony under oath, by his ever changing version of the facts. As the trial court noted, Lankford, by continuing to change his story, "failed to take any responsibility whatsoever for his actions." To the trial court, Lankford's continual testifying falsely under oath evidenced a scheming on his part which demonstrated a lack of "capacity for rehabilitation."

Lankford argues that the sentencing was a proceeding entirely separate from his trial and that he can therefore reassert his waived privilege. However, if a defendant has previously waived his privilege against self incrimination by voluntarily testifying at trial, that waiver continues into sentencing with respect to the testimony voluntarily given at trial. *See Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866 (1981). *See also Harrison v. United States*, 392 U.S. 219, 88 S.Ct. 2008 (1968); *cf. United States v. Houp*, 462 F.2d 1338, 1340 (8th Cir. 1972) ("Once the privilege is effectively waived, the information given is admissible at any subsequent trial," *citing Harrison v. United States*, 392 U.S. 219, 101 S.Ct. 1866 (1981)); *Neely v. State*, 292 N.W.2d 859, 864 (Wis. 1980) ("[A] defendant who takes the stand in his own behalf cannot then claim the privilege against cross examination on matters reasonably related to the subject matter of his direct examination," *citing McGautha v. California*, 402 U.S. 183, 215, 91 S.Ct. 1454, 1471 (1971).

Neither Lankford's immunity under the agreement nor his privilege against self incrimination prevent the trial court from considering at sentencing his lack of credibility resulting from his inconsistent and false testimony in the several proceedings prior to sentencing. There is no protected right to commit perjury either under the fifth amendment, *United States v. Wong*, 431 U.S. 174, 97 S.Ct. 1823 (1977); *Glickstein v. United States*, 222 U.S. 139, 32 S.Ct. 71 (1911), or pursuant to I.C. § 19-1115.

Accordingly, since the testimony Lankford gave at the hearing on his co-defendant brother's motion for new trial involved the same transaction and the same matters which he voluntarily testified about in his own defense on his own case, there was no fifth amendment immunity available to him with respect to these matters, and there could be no fifth amendment violation. Assuming that the United States Supreme Court's decision in *Satterwhite* applies to fifth amendment as well as sixth amendment claims, it still has no application to this case because there was no fifth amendment violation. Accordingly, we need not reach the *Satterwhite* "harmless error" analysis. We reaffirm our prior decision in this matter.

IV

As an alternative and independent ground for our decision, we hold that even if Lankford had not testified at his own trial, thereby waiving immunity under the fifth amendment, the immunity agreement which he and his counsel proposed and voluntarily entered into was sufficient to waive his fifth amendment privilege against self incrimination with respect to testimony given at Mark's trial and hearing on motion for new trial.

V

Lankford has again raised other issues of state law previously raised on direct appeal. Our prior opinion, *State v. Lankford*, 113 Idaho 688, 747 P.2d 710 (1987), resolved all those other issues against Lankford and those other issues are the law of the case and final. *Rawson v. United Steelworkers of America*, ___ Idaho ___, ___ P.2d ___ (1988) ("[S]ince the United States Supreme Court has jurisdiction only to require our reconsideration of matters involving federal law, our decisions [on state law issues] remain the law of the case and we decline to reopen them under certiorari procedure.").

We reaffirm our prior decision.

SHEPARD, CJ., and HUNTLEY, J., concur.

JOHNSON, J., concurring and dissenting.

I concur in part V, but dissent from parts II, III and IV of the majority opinion. In my view, Lankford's fifth amendment rights were violated by the trial court's reliance at sentencing on Lankford's testimony at the trial of Lankford's brother and at the hearing on his brother's motion for a new trial. The testimony at the brother's trial was given by Lankford after an immunity agreement had been approved by the trial court. The testimony at the hearing on the brother's motion for a new trial was given by Lankford after the trial court had accepted an agreement by defense counsel and the prosecutor that Lankford's testimony would be used only for the purposes of his brother's motion for new trial. I would hold that under Satterwhite v. Texas, 486 U.S. ___, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988) this violation was not harmless error.

LANKFORD'S IMMUNIZED TESTIMONY AND ITS USE IN SENTENCING.

Lankford and the prosecuting attorney entered into an immunity agreement concerning his testimony at his brother's trial. The agreement recited that Lankford would refuse to answer questions if he were called to testify, on the ground that he might incriminate himself. The agreement granted Lankford immunity "from

prosecution and penalty co-extensive with Idaho Code § 19-1114." The trial court found that there was "good cause" for the agreement and approved it. At his brother's trial Lankford testified that his brother killed the Bravences.

After his brother was convicted, Lankford was called to testify at a hearing on his brother's motion for a new trial. His attorney told the trial court in that hearing that on the basis of the fifth amendment she had advised Lankford not to testify. She said that she did not want him testifying on matters to which he had testified previously, because she did not believe that his testimony at his brother's trial was voluntary, but was coerced. After extended discussion between the trial court and counsel, the trial court accepted the agreement of the prosecuting attorney and Lankford's attorney that Lankford's testimony at the hearing would be used for purposes of his brother's motion for new trial and for no other purpose. Lankford then testified about a conversation he had with a newspaper reporter from the Lewiston Tribune. He told the reporter that he alone killed the Bravences. He testified at the hearing on his brother's motion for a new trial that this was a lie and that he had told the reporter he committed the murders because his brother told him to do it.

In sentencing Lankford to death the trial court considered both his testimony at his brother's trial and his testimony at the hearing on his brother's motion for a new trial. Under the title "Reasons Why Death Penalty Was Imposed" in the trial court's findings considering the death penalty, the trial court referred to this testimony and concluded by stating:

> Suffice it to say that the defendant has failed to take any responsibility whatsoever for his actions. This court specifically finds that the defendant has no capacity for rehabilitation.

Fifteen lines later the trial court imposed the death penalty.

LANKFORD'S FIFTH AMENDMENT RIGHTS WERE VIOLATED.

It is clear that Lankford would not have testified at his brother's trial, or at the hearing on his brother's motion for a new hearing, unless his testimony had been immunized. The use of his testimony by the trial court in sentencing was a violation of his rights under the fifth amendment. Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972).

In Kastigar the Supreme Court said:

> Immunity from the use of compelled testimony ... prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.

Id. at 453, 92 S.Ct. at 1661.

In my view, this prohibition was violated when the trial court used Lankford's testimony in fashioning his sentence.

THE VIOLATION WAS NOT HARMLESS ERROR.

In its original opinion in this case (State v. Lankford, 113 Idaho 688, 747 P.2d 710 (1987)) this Court quoted the portion of the findings of the trial court concerning Lankford's testimony at his brother's trial and at the hearing on his brother's motion for new trial and stated:

> Although it is true that the district court judge pointed out the conflicting testimony given by Lankford at various times, including the testimony given pursuant to the immunity agreement, there has been no showing that the sentence was based upon the comments quoted above.

Id. at 696, 747 P.2d at 718, n.7.

In my opinion, it is this comment that caused the United States Supreme Court to vacate the judgment and to remand this case to us for further consideration in light of Satterwhite v. Texas.

In Satterwhite the Supreme Court held:

> It is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer.
>
> ....
>
> The question ... is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (Citing Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).)

486 U.S. at ___, 108 S.Ct. at 1798, 100 L.Ed.2d at 290.

I am unable to say, beyond a reasonable doubt, that Lankford would have been sentenced to death, if his immunized testimony had not been used.

I would reverse and remand for resentencing and direct the trial court not to consider the immunized statements of Lankford.

BISTLINE, J., concurs.

APPENDIX C

Idaho Code Sections

I.C. 18-4001. Murder defined. Murder is the unlawful killing of a human being with malice aforethought or the intentional application of torture to a human being, which results in the death of a human being. Torture is the intentional infliction of extreme and prolonged pain with the intent to cause suffering. It shall also be torture to inflict on a human being extreme and prolonged acts of frugality irrespective of proof of intent to cause suffering. It shall also be torture to inflict on a human being extreme and prolonged acts of frugality irrespective of proof of intent to cause suffering. The death of a human being caused by such torture is murder irrespective of proof of specific intent to kill; torture causing death shall be deemed the equivalent of intent to kill.

I.C. 18-4002. Express and implied malice. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take aware the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

I.C. 18-4003. Degrees of murder. (Excerpt)
to perpetrate, arson, rape, robbery, burglary, kidnapping or mayhem is murder of the first degree.

I.C. 19-2515. Inquiry into mitigating or aggravating circumstances -- sentence in capital cases -- statutory aggravating circumstances -- judicial findings. (Excerpt)

(c) Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.

(d) In all cases in which the death penalty may be imposed, the court shall, after conviction, order a presentence investigation to be conducted according to such procedures as are prescribed by law and shall thereafter convene a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. At such hearing, the statute and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation. Should any party present aggravating or mitigating evidence which has not previously been disclosed to the opposing party or parties, the court shall, upon request, adjourn the hearing until the party desiring to do so has had a reasonable opportunity to respond to such evidence. Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing. Evidence offered at trial but not admitted may be repeated or amplified if necessary to complete the record.

(e) Upon the conclusion of the evidence and arguments in mitigation and aggravation the court shall make written findings setting forth any statutory aggravating circumstance found. Further, the court shall set forth in writing any mitigating factors considered and, if the court finds that mitigating circumstances outweigh the gravity of any aggravating circumstance found so as to make unjust the imposition of the death penalty, the court shall detail in writing its reasons for so finding.

(f) Upon making the prescribed findings, the court shall impose sentence within the limits fixed by law.

(g) The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed.

(1) The defendant was previously convicted of another murder.

(2) At the time the murder was committed the defendant also

committed another murder.

(3) The defendant knowingly created a great risk of death to many persons.

(4) The murder was committed for remuneration or the promise of remuneration or the defendant employed another to commit the murder for remuneration or the promise of remuneration.

(5) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(6) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.

(7) The murder was one defined as murder of the first degree by section 18-4003, Idaho Code, subsections (b), (c), (d), (e), or (f), and it was accompanied with the specific intent to cause the death of a human being.

(8) The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

(9) The murder was committed against a former or present peace officer, executive officer, officer of the court, judicial officer or prosecuting attorney because of the exercise of official duty.

(10) The murder was committed against a witness or potential witness in a criminal or civil legal proceeding because of such proceeding.

I.C. 19-2516. Inquiry into circumstances - Examination of witnesses. The circumstances must be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or inform as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court may direction. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section.

APPENDIX C-2

APPENDIX D

May 1, [illegible]

[illegible]

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

STATE OF IDAHO, Plaintiff,	)	Case #20157
vs.	)	
BRYAN STUART LANKFORD, Defendant.	)	ORDER RE: SENTENCING HEARING

WHEREAS, a trial in the above matter was had resulting in a verdict being returned by the jury on March 31, 1984, finding the above named defendant guilty of the crime of Murder in the First Degree, two counts, an offense for which the death penalty is authorized; and,

WHEREAS, pursuant to the provisions of Rule 33.1, Idaho Criminal Rules, an Order was entered requiring that a Pre-Sentence Investigation be conducted by the Idaho Department of Probation and Parole and that a report thereof be filed with the Court; and,

WHEREAS, an Order was entered requiring that the Defendant be examined by Dr. Michael Estes, a Psychiatrist, and that a psychological report upon the condition of the defendant be filed with the Court,

IT IS HEREBY ORDERED AS FOLLOWS:

(1) Sentencing is set for June 28, 1984 at 2 p.m.;

(2) That the Pre-sentence Investigation Report required by rule 33.1 I.C.R. be filed with the Court on or before June 14, 1984;

(3) That the Psychological Evaluation be filed with the Court on or before June 14, 1984;

(4) That on or before June 18, 1984 counsel for the State and Defense shall file with the Court a statement as to whether or not they have received the two above mentioned reports;

(5) That on or before June 18, 1984 the State shall notify the Court and the Defendant in writing as to whether or not the State will be seeking and recommending that the death penalty be imposed herein. Such notification shall be filed in the same manner as if it were a formal pleading;

(6) That in the event the State shall seek and recommend to the Court that the death penalty be imposed herein the following shall be filed with the Court on or before June 18, 1984:

(a) The State shall formally file with the Court and serve upon counsel for the Defendant a statement listing the aggravating circumstances enumerated in Idaho Code §19-2515(f) that it intends to rely upon and prove at the sentencing hearing to justify the imposition of the death penalty;

(b) The Defendant shall specify in a concise manner all mitigating factors which he intends to rely upon at the time of the sentencing hearing.

Dated this 17th day of May, 1984.

GEORGE REINHARDT
District Judge

Sep 1[illegible] DOCKETED

BY [illegible]

DENNIS L. ALBERS
HENRY R. BOOMER
Idaho County Prosecuting Attorney
P. O Box 314
Grangeville, Idaho 83530
(208) 983-2310

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff,	)	Case No. 20157
	)	
vs.	)	RESPONSE TO ORDER CONCERNING SENTENCING
	)	
BRYAN STUART LANKFORD,	)	
	)	
Defendant.	)	

COMES NOW, Dennis L. Albers, in relation to the Court's Order of September 6, 1984, and makes the following response.

In relation to the above named defendant, Bryan Stuart Lankford, the State through the Prosecuting Attorney will not be recommending the death penalty as to either count of first degree murder for which the defendant was earlier convicted.

DATED this 13 day of September, 1984.

DENNIS L. ALBERS

Certificate of Mailing

I, Dennis L. Albers, do hereby certify that a copy of the foregoing Response to Order Concerning Sentencing was mailed by me by regular first class mail deposited in the U. S. Post Office at Grangeville, Idaho, this 13 day of September, 1984, to:

W. W. Longeteig
Attorney at Law
P. O. Box 155
Craigmont, Idaho 83523

DENNIS L. ALBERS

APPENDIX E

Oct 15 ... DOCKETED

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

STATE OF IDAHO, Plaintiff,	)	Case #20157
vs.	)	FINDINGS OF THE COURT IN CONSIDERING DEATH PENALTY UNDER SECTION 19-2515, IDAHO CODE.
BRYAN STUART LANKFORD, Defendant.	)	

The above defendant having been found guilty by a jury of the criminal offense of Murder in the First Degree - Two Counts (I.C. §18-4003(d)) which under the law authorizes the imposition of the death penalty; and the court having ordered a presentence investigation of the defendant and thereafter held a sentencing hearing for the purpose of hearing all relevant evidence and argument of counsel in aggravation and mitigation of the offense;

NOW, THEREFORE the Court hereby makes the following findings:

1. Conviction. That the defendant while represented by court appointed counsel was found guilty of the offense of Murder in the First Degree - Two Counts (I.C. §18-4003(d)) by jury verdict.

2. Presentence Report. That a presentence report was prepared by order of the court and a copy delivered to the defendant or his counsel at least seven (7) days prior to the sentencing hearing pursuant to section 19-2515, Idaho Code, and the Idaho

Criminal Rules.

3. Sentencing Hearing. That a sentencing hearing was held on October 12, 1984, pursuant to notice to counsel for the defendant; and that at said hearing, in the presence of the defendant, the court heard relevant evidence in aggravation and mitigation of the offense and arguments of counsel.

4. Facts and Argument Found in Mitigation.

(a) Because of the Defendant's age (24) there is a possibility that he could be rehabilitated.

(b) The Defendant smoked marijuana shortly prior to the murders of Mr. and Mrs. Bravence.

(c) The Defendant had a deprived childhood and was abused by his father.

(d) When the defendant is in the company of his brother, Mark Lankford, Mark Lankford is the more dominant of the two.

(e) The defendant is relatively intelligent and has a good command of the English language.

(f) The defendant has the capacity to be employed and is capable of being trained for employment.

5. Facts and Argument Found in Aggravation.

(a) The defendant is a dangerous and violent individual.

(b) The defendant has a personality disorder with anti-social features predominant.

(c) The defendant is deceitful and calculatingly manipulative.

(d) The defendant has never held a steady job and associates with undesirable individuals.

(e) The defendant has no significant ties to any community or to any individual.

(f) The defendant's past pattern of living clearly indicates that he will continue a life of criminal activity.

(g) The defendant has a past criminal record, including being adjudged guilty of the offense of Robbery in 1980. The

Defendant was placed on probation for 10 years for the Robbery offense. The defendant threatened the life of a Safeway clerk with a gun or an object intended to appear like a gun.

(h) The murders of Mr. and Mrs. Bravence were cold blooded and pitiless. The killing was not a product of psychotic behavior but was thought out and schemed.

(i) The defendant has previously failed to comply with a probation which he received for the robbery of the Safeway store.

(j) After the jury verdict of guilty in these cases and while awaiting sentencing, the defendant became involved in an altercation with, and threatened the life of a fellow inmate in the Idaho County Jail.

6. Statutory Aggravating Circumstances Found Under Section 19-2515(f), Idaho Code. This court finds beyond any reasonable doubt that the following five statutory aggravating circumstances exist:

(a) At the time the murder was committed the defendant also committed another murder - that is at the time Robert Bravence was murdered by the defendant, he also murdered Cheryl Bravence.

(b) The murders of the Bravences were especially heinous, atrocious or cruel, and manifested exceptional depravity. ~~As stated earlier~~ The victims did nothing to provoke the defendant who caused their skulls to be viciously and repeatedly beaten until smashed. The beating of Mr. and Mrs. Bravence was accomplished in such a way as to be characterized as extremely wicked and shockingly vile. The depravity exhibited by the defendant, in killing Mr. and Mrs. Bravence demonstrated a depravity which obviously offends all standards of morality and intelligence.

(c) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life. The defendant participated in the murder of the Bravences for nothing more than the hopes of obtaining a van and a few credit cards. The theft could easily have been accomplished without having resorted to murder. The murders were cold blooded and pitiless in that the defendant, in a cool, calm, and calculated

manner decided, with no provocation whatsoever, to take the lives of this young couple.

(d) The murders were defined as murder of the first degree by Idaho Code Section 18-4003(d) and the murders were accompanied with the specific intent to cause the deaths of Mr. and Mrs. Bravence. After causing the skulls of the Bravences to be smashed in, the defendant and his brother carried the unconscious bodies (dead or near death) into a remote area where they were left dead or to die.

(e) The defendant, by prior conduct and by conduct in the commission of the murders at hand has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

7. Reasons Why Death Penalty Was Imposed.

(a) This court finds that the mitigating circumstances which were presented do not outweigh the gravity of the Statutory Aggravating Circumstances listed above as would make the imposition of the death penalty unjust.

(b) The mitigating circumstances which were presented do not outweigh any one of the Statutory Aggravating Circumstances listed above as would make the imposition of the death penalty unjust.

(c) The jury in this case found the defendant to be guilty of two counts of murder of the first degree. The evidence clearly demonstrates and this court finds that the murders were intentionally committed by Mark and Bryan Lankford, each of whom, with the assistance of the other, caused the skulls of a young couple, Mr. and Mrs. Bravence, who were camping on the South Fork of the Clearwater River, in Idaho County, Idaho, to be smashed.

Furthermore, that following said assault Bryan and Mark Lankford loaded Mr. and Mrs. Bravence into the Bravence's camping van and drove them a short distance into the mountains

for disposal. The Lankfords carried the non-conscious Bravences into the woods and covered their bodies with brush not knowing whether or not they were dead but knowing full well that if they were not dead that death was inevitable as a result of the condition of their skulls and the fact that they were left unattended in a remote area.

Furthermore, this court finds that the murders were unprovoked. The Lankfords jointly, with malice aforethought, determined to kill the Bravences for money and for the camping van of the Bravences which carried Texas license plates and Texas registration. Said Texas identification would coincide with personal identification of the Lankfords who resided in Texas. This court further finds that the murders were committed with an abandoned and malignant heart. The lankfords possessed a shotgun which was held on Mr. Bravence by Bryan Lankford. Mark and Bryan Lankford then caused the skull of Mr. Bravence to be smashed who offered no resistence whatsoever and who did nothing to provoke the assault. Some time later Mrs. Bravence came to the site where her young husband was lying unconscious. Mrs. Bravence offered no resistence but went to her husband's side. Then the skull of Mrs. Bravence was caused to be smashed by the Lankfords. This court does not know how many times the head of Mr. Bravence or Mrs. Bravence was struck or with what their heads were struck. However, the blows were multiple in terms of number and tremendous in terms of force. This court does not know how many blows were struck by Bryan Lankford or how many blows were struck by Mark Lankford. The evidence clearly demonstrates and this court finds that both Bryan Lankford and Mark Lankford committed acts of force and violence directly upon the persons of Mr. and Mrs. Bravence which acts directly and proximately caused the deaths of Mr. and Mrs. Bravence. The facts show that either Bryan Lankford or Mark Lankford could have prevented the deaths of Mr. and/or

Mrs. Bravence.

The facts clearly show that after the bodies of Mr. and Mrs. Bravence were covered with brush and the Lankfords had successfully escaped the scene of the beatings - that both Bryan Lankford and Mark Lankford were in a position, without fear of harm from the other, to take steps to notify authorities anonymously or otherwise, of the location of Mr. and Mrs. Bravence on the chance that they may still have been alive. Neither of the Lankfords chose to do so however and instead they partied on the credit cards of the Bravences. They wined and dined themselves and stayed in expensive motels feeling secure and obviously content with their situation. This clearly shows a lack of remorse on the part of Mark and Bryan Lankford which has persisted to date.

The objectives of sentencing are:

(a) Protection of society.

(b) Deterrence (General and Special or Individual).

(c) Rehabilitation.

(d) Punishment or Retribution for wrongdoing.

With reference to the first objective, "Protection of Society", I find specifically that Bryan Lankford is a dangerous individual, that he is a violent individual, that he has a personality disorder with anti-social features predominant. He is dishonest, he is the prince of deceit, he is calculatingly manipulative. Bryan Lankford has floated from job to job and has in the past associated with undesirable individuals. He has no significant ties to any community or any individuals and his pattern of living clearly indicates that he will continue a life of criminal activity. Bryan Lankford was adjudged guilty of Robbery in 1980 and was placed on probation for 10 years. Finally, after being convicted of two counts of 1st degree murder, and while awaiting sentencing, the Defendant became involved in an altercation with, and threatened the

life of, a fellow inmate in the Idaho County Jail.

With reference to the 2nd objective of sentencing, "Deterrence", it should be noted that the plan to kill the Bravences was not a product of passion or psychotic behavior but was thought out and schemed. This Court is thus convinced that the punishment to be imposed will function as a general deterrent to murder. Furthermore, the liklihood of similiar future conduct is so certain that removal from society is the only method which will successfully deter Bryan Lankford from engaging in similiar conduct.

The third objective of sentencing is "Rehabilitation". This is the notion that I can do something or order something such that Bryan Stuart Lankford will contribute to, as opposed to detract from, the well being of society. It should be stressed that the defendant was considered for a rehabilitation plan when placed on probation for Robbery. The plan obviously failed. Had Bryan Lankford been placed in prison for Robbery of the Safeway store the Bravences would be alive today. We cannot however fault the Texas judicial system for giving Bryan Lankford a chance to better himself and for giving him an opportunity to prove that he could be a productive citizen. At the time he was placed on probation he had a minor criminal record. He blamed all his troubles on his father's cruel treatment towards him and the bad influence that his brother had on him. Furthermore, his family supported him. Perhaps the reason that our judicial system is credible and viable is because a first time offender who threatens the life of an innocent Safeway clerk can be placed on probation and given a chance. By the same token however, our judicial system will loose credibility and viability if we continue to permit the corrupt to terrorize the innocent

in our society.

The defendant has shown no remorse for his offenses. He has not cooperated with authorities after his arrest. He has told authorities that he and his brother had nothing whatsoever to do with the death of the Bravences. He has testified that his brother was alone involved in the murders. He has testified (On October 10, 1984 in the companion case, State vs. Mark Lankford, Idaho County Case #20158) that he called the Lewiston Tribune and claimed that it was he alone who murdered the Bravences this he later denied and offered the explanation which is set forth in the addendum to the presentence investigation report under date of October 3, 1984 to the effect that it was simply part of a plan that would secure freedom for his brother who could in turn free him.

Suffice it to say that the defendant has failed to take any responsibility whatsoever for his actions. This court specifically finds that the defendant has no capacity for rehabilitation.

The final objective of sentencing is Punishment or Retribution for wrongdoing. This aspect of sentencing is, in essence, an expression of community disapproval for the acts in question. The sentence that I have determined to be appropriate in this case is the least sentence that would not unduly deprecate the seriousness of the crimes in question.

As stated in State v. Miller, 105 Idaho 838, 841, "An intentional killing takes from the victim what an offender never can restore - the fragile gift of life. It is the final betrayal of another human being and the ultimate affront to civility. Our courts have no deeper obligation than to express society's condemnation of this act."

It is the opinion of this Court after much considered thought and soul-searching that the only way to protect society is to order, and this court does order that the defendant be sentenced to suffer the punishment of death for the murder of Captain Robert Bravence and his wife, Mrs. Cheryl Bravence.

CONCLUSION

That the death penalty should be imposed for the capital offenses of which he was convicted.

Dated this 15th day of October, 1984.

GEORGE REINHARDT
District Judge

Oct 15 ... FILED

DOCKETED

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

STATE OF IDAHO, Plaintiff, vs. BRYAN STUART LANKFORD, Defendant.	Case #20157 JUDGMENT AND SENTENCE

The above entitled matter came on to be heard before the Honorable George Reinhardt, one of the Judges of the above entitled Court, on Monday, October 15, 1984. The Plaintiff, State of Idaho, was represented by Dennis L. Albers, Prosecuting Attorney for Idaho County, Idaho; the Defendant was personally present in court and was represented by Joan Fisher, Attorney at Law.

WHEREUPON, the presentence report previously ordered having been filed herein, and the Court having ascertained that the Defendant had had an opportunity to read said report, and all parts thereof, and the Defendant having been given an opportunity to explain, correct, or deny parts thereof, and the Court having heard the same as well as having heard testimony and argument in mitigation and aggravation pursuant to Idaho Code Section 19-2515, and the Defendant at such hearing having advised the Court that he had no legal cause to show why judgment and sentence should

not be pronounced against him, and the Court thereafter having entered Findings of the Court in Considering Death Penalty Under Section 19-2515, Idaho Code, the Court did then pronounce its Judgment and Sentence in accordance with said Findings and as follows:

With respect to the charges stated in the Information on file herein, and pursuant to the verdicts of the jury rendered herein which by reference are incorporated herein,

IT IS HEREBY ORDERED, AND IT IS THE JUDGMENT OF THIS COURT THAT YOU, BRYAN STUART LANKFORD, ARE GUILTY OF TWO COUNTS OF THE CRIME OF MURDER IN THE FIRST DEGREE as charged in said Information and as found by the unanimous verdict of the jury; and,

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that you be, and you hereby are, sentenced to suffer death in accordance with the provisions of Idaho Code Section 18-4004 and in the manner prescribed by Chapter 27 of Title 19, Idaho Code, at the Idaho State Penitentiary, Boise, Ada County, Idaho.

IT IS HEREBY FURTHER ORDERED that you be, and hereby are, remanded to the custody of the Idaho County Sheriff, there to be held until such time as demand is made for delivery to the duly authorized guard of the Idaho State Department of Corrections and for transportation by said guard to the said Idaho State Penitentiary.

ENTERED at Grangeville, Idaho County, State of Idaho, this 16th day of October, 1984.

GEORGE REINHARDT
District Judge